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SCHOOL OF LAW

A TREATISE

ON THE

MEASURE OF DAMAGES

OR

AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE

BY

THEODORE SEDGWICK

AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW"

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BY

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AND

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439b. Fraud in effecting a sale.
439c. Fraud in inducing a contract of insurance.
439d. Fraud in procuring a conveyance.
439e. Fraud in securing a loan.
439f. Misrepresentation of credit of a third party.
§ 439g. Fraud in obtaining payment of debt owed another.
439h. Fraud in dealings with corporate stock.
439i. Fraud by promoter of a joint enterprise.
439j. Fraud in procuring marriage.
439k. Assignments in fraud of creditors.
440. Other frauds.
441. Consequential damages.
442. Expenses.

I.—General Considerations

§ 428. Torts in general.

Having thus considered the general rules which govern and limit compensation in all cases, we now proceed to consider the special rules applicable in actions of tort; deferring, however, the examination of such torts as affect real estate to a later chapter. The technical forms prescribed by the common law

for the redress of wrongs, or, as they are termed, actions *ex delicto*, were trespass, case, replevin, and detinue.[1] The divisions of the system in this respect were arbitrary; there being many actions nominally in tort, which in respect to the measure of relief, were treated as virtually actions *ex contractu;* and in these cases a fixed rule of damages has always been adhered to. In all cases of tort where no question of fraud, malice, or oppression intervenes, the measure of compensation is determined by fixed rules. So in an action of trespass without any circumstances of aggravation, the Supreme Court of the United States said that, the case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury.[2] So the Supreme Court of New Jersey said in an action of *trespass quare clausum fregit:* "In actions of trespass, where the plaintiff complains of no injury to his person or his feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it, the measure of damages is a question of law, and is necessarily under the control of the court." [3] And so again in North Carolina, in an action for trespass for destroying a building by fire, the jury at Nisi Prius were directed that the measure of damages was not the value of the building, but the amount it would have taken to rebuild it if destroyed. But this, on review, was held wrong; and the court said: "The proper measure in actions of this kind, is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. But whether they should have been given or not was a question

[1] The old action of detinue is of comparatively rare occurrence, and is frequently abolished by statute.

Grotius thus begins his chapter: *De Damno. Supra diximus ejus quod nobis debetur fontes esse tres; pactionem—maleficium—legem. De pactionibus satis tractatum. Veniamus ad id quod ex maleficio naturaliter debetur.* Lib. ii, cap. 17, § 1, *De Jure Belli et Pacis.* Grotius treats only of Damnum, under this head of Maleficium. *De Jure Belli et Pacis*, lib. ii, cap. 17.

[2] Conard *v.* The Pacific Ins. Co., 6 Peters, 262, 282, 8 L. ed. 262. See, also, Bell *v.* Cunningham, 3 Peters, 69, 7 L. ed. 69; Tracy *v.* Swartwout, 10 Peters, 80, 95, 9 L. ed. 80.

[3] Berry *v.* Vreeland, 21 N. J. L. 183.

which ought to have been submitted with proper instructions to the jury." [4]

§ 429. Measure of relief independent of form of action.

* It follows, from what has been said, that in the cases of wrongs such as we now proceed to consider, the measure of relief does not depend on the form of the action; whether case or trespass would have been the proper form of action at common law, if no aggravation be proved, the rule of damages is a question of law; though it is always competent to show those circumstances of evil motive which, as we have already seen, go to place the subject of relief largely within the control of the jury. In regard to this class of cases generally, it will be noticed that the object is to limit relief to compensation, as that term is legally understood; and we shall find, therefore, that while the power of the jury over the subject in cases of aggravation is fully recognized, still, even where such facts are presented, if evidence has been admitted or directions given at the trial, which, had the intention of the jury been to give compensatory and not vindictive damages, would have been incorrect, the court, assuming that such was the purpose of the jury, will exercise their control over the subject. "We consider the law," says the Superior Court of New York, "as properly and wisely settled, that the quantum of damages, with the exception of cases in which exemplary or vindictive damages may properly be given, is strictly a question of law; so that the jury are bound by the rule which the judge directs them to follow." [5] In an early case in Pennsylvania, for running down a ship, it was intimated that where the act complained of was purely fortuitous, the jury might give less than the value of the property; but if there be any right of action, the least compensation is certainly the value of property taken or destroyed.[6] **

In Milwaukee & St. Paul Railway *v.* Arms,[7] Mr. Justice Davis said: "It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suf-

[4] Wylie *v.* Smitherman, 8 Ired. (N. C.) 236.

[5] Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614, 628, per Duer, J. See, also, Baker *v.* Wheeler, 8 Wend. (N. Y.) 505.

[6] Bussy *v.* Donaldson, 4 Dall. 206, 1 L. ed. 802.

[7] 91 U. S. 489, 23 L. ed. 374; *acc.*, Swayne, J., in Oelrichs *v.* Spain, 15 Wall. 211, 230, 21 L. ed. 43.

fered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may, in certain cases, be assessed." This being so, the same rules of compensation should apply in contract and in tort. The decided cases are generally to this effect, and this is the tenor of Judge Rapallo's remarks, in Baker *v.* Drake.[8]

§ 430. Aggravation and mitigation.

We have already seen [9] that where the amount of compensation is wholly or in part in the discretion of the jury, the circumstances attending the injury may be shown for the purpose of enhancing or mitigating the damages. It is to be observed, however, that whether the action be in tort or in contract, if the damages are measured entirely by the value of property, or by the amount of injury to property, no circumstances can be shown for this purpose.

§ 431. Joint wrongdoers.[10]

In an action of tort the damages are not divisible. There can be but one verdict and for one amount against all of those found guilty. All are principals; and each defendant is liable for all the damages sustained, without regard to different degrees or shades of wrongdoing.[11] The fact that one of the defendants received only a small proportion of the proceeds of the tort, or none at all, does not lessen the recovery against him.[12] So, where all the defendants, in an action charging them with a joint trespass, are defaulted, and the case referred to an assessor to assess the damages, they are all liable for the

[8] 53 N. Y. 211, 216.

[9] § 51.

[10] See *ante*, § 36*a*.

[11] *Georgia:* Mashburn *v.* Danneberg, 117 Ga. 567, 44 S. E. 97.

Indiana: Peru Heating Co. *v.* Lenhart, 95 N. E. 680.

Kentucky: Hill *v.* Mudd, 9 Ky. L. Rep. 59.

New York: Beal *v.* Finch, 11 N.Y. 128; Posthoff *v.* Bauendahl, 43 Hun, 570.

Rhode Island: Heyer *v.* Carr, 6 R. I. 45.

Canada: Grantham *v.* Severs, 25 Up. Can. Q. B. 468; Barker *v.* Westover, 5 Ont. 116.

[12] *Alabama:* Stix *v.* Keith, 85 Ala. 465.

Massachusetts: White *v.* Sawyer, 16 Gray, 586.

Vermont: Crumb *v.* Oaks, 38 Vt. 566.

Canada: McMillan *v.* Fairley, 1 Han. 325.

Macklem *v.* Durrant, 32 Up. Can. Q. B. 98.

whole damage actually sustained by the plaintiff, although it appears, by the evidence before the assessor, that one of them did not participate in the trespass.[13] But where the tort is really made up of several tortious acts, each defendant is liable only for those in which he participated. In an action for the wrongful seizure of the plaintiff's cattle, it appeared that Fleming, one of the defendants, had recovered a judgment against a brother of the plaintiff, on which the execution was issued; Fleming, with her attorney in that suit, who had directed the wrongful seizure, were joined as defendants. A verdict was found against both defendants for £83 15*s*. 10*d*. Of this £25 was for the seizure; and the rest was the amount of the costs ordered against the defendant Fleming in an interpleader suit, which had been had to try the title to the cattle. An order had been made in that suit that Fleming pay those costs, and as this order was equivalent to a judgment, it was held that the judgment against Fleming must be reduced by that amount. And as the plaintiff could not recover these costs against her, and could not recover against her attorney any other damages than he was entitled to against her, the court reduced the verdict by the amount of the costs.[14] Where damage is done by cattle belonging to different owners, each owner is liable for the damage done by his own cattle, and for no more; and in the absence of all proof as to the amount of damage so done, the law will infer that the cattle did equal damage.[15]

II.—Taking or Injuring Personal Property

§ 432. General rules.

We proceed now to notice the general rules which govern in trespass for taking or injuring personal property. Where personal property is taken or injured, the remedy at common law was by an action of trespass *de bonis asportatis*, or by an action on the case. As has been seen, however, the form of action should cause no difference in the measure of damages; and the distinction has in fact been very generally abolished under the modern systems of pleading. In this discussion injuries which

[13] Gardner *v.* Field, 1 Gray, 151.

[14] Power *v.* Fleming, 4 Ir. R. (C. L.) 404.

[15] Wood *v.* Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912; Partenheimer *v.* Van Order, 20 Barb. (N. Y.) 479; *ante* § 36*a*.

would formerly have been remedied by an action of trespass and those where case would have been brought have been grouped together, no distinction being noted.

The principal injury in this case being pecuniary, the damages are not capable of mitigation in the strict sense, as distinguished from reduction.[16] So where defendant killed a dog which was trespassing on his land and was about to do harm, the killing being illegal, the trespass could not be shown to mitigate the damages.[17]

Any pecuniary injury, however small, is regarded as entitling the injured party to recovery, for no real invasion of property rights is a proper case for the application of the maxim *de minimis non curat lex.* So where defendant as a practical joke took plaintiff's reins from his harness, in spite of the small amount of loss the plaintiff was held entitled to recover compensatory damages.[18]

§ 432a. Damages for destruction or total loss.

It has been often decided, that where trespass is brought for personal property, and no circumstances of aggravation are shown, the action is to be regarded as similar to one of conversion, and the value of the property, with interest, furnishes the measure of damages.[19] In a case in Massachusetts, tres-

[16] *Ante*, § 51.

[17] Ten Hopen *v.* Walker, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598.

[18] Wartman *v.* Swindell, 54 N. J. L. 589, 25 Atl. 356, 18 L. R. A. 44.

[19] *United States:* The Henry Buck, 39 Fed. 211.

Alabama: Louisville & N. R. R. *v.* Kelsey, 89 Ala. 287.

Arkansas: St. Louis, I. M. & S. Ry. *v.* Biggs, 50 Ark. 169.

California: Dorsey *v.* Manlove, 14 Cal. 553.

Colorado: Parks *v.* Sullivan, 46 Colo. 340, 104 Pac. 1035.

Connecticut: Oviatt *v.* Pond, 29 Conn. 479.

Delaware: Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605.

Illinois. Gilson *v.* Wood, 20 Ill. 37; Toledo, P. & W. Ry. *v.* Johnston, 74 Ill. 83.

Kentucky: Schulte *v.* Louisville & N. R. R., 128 Ky. 627, 108 S. W. 941.

Louisiana: Yarborough *v.* Nettles, 7 La. Ann. 116.

Maryland: Schindel *v.* Schindel, 12 Md. 108.

Mississippi: Briscoe *v.* McElween, 43 Miss. 556.

Missouri: Walker *v.* Borland, 21 Mo. 289; Funk *v.* Dillon, 21 Mo. 294; State *v.* Smith, 31 Mo. 566.

New Hampshire: Felton *v.* Fuller, 35 N. H. 226.

New Jersey: Hopple *v.* Higbee, 23 N. J. L. 342.

New York: Campbell *v.* Woodworth, 26 Barb. 648.

Pennsylvania: Fernwood M. H. A. *v.* Jones, 102 Pa. 307.

pass was brought for destroying game-cocks, which had been taken by a public officer acting on an erroneous construction of the statute against gaming. It was held that, though cock-fighting is in that State illegal, the sale of game-cocks is lawful; and that the measure of the plaintiff's damages was "what the cocks were worth to him as articles of merchandise or sale, whether the market for them was to be found in this commonwealth or elsewhere." [20] So where property of the plaintiff was sold by the defendant on an execution which was afterwards reversed on appeal, the measure of damages was the value of the property at the time of the sale.[21] From the value of the property is of course to be deducted any amount realized from the sale and returned to the plaintiff or applied to his benefit.[22]

§ 433. Value, how estimated.

The market value of the property, with interest from the time of the trespass, not its value to the plaintiff, is usually said to be the measure.[23] So where the defendant had carried off some corn belonging to the plaintiff, it was held that the market value at the time of taking was the measure of damages, and the plaintiff could not show that he had a contract to deliver that corn, and what it was worth to him under that contract, "especially in the absence of knowledge of such contract by defendant." [24] But this is subject to the qualifications heretofore pointed out that the *value* is the fundamental rule, that the market price is only one of the evidences of this value, and the value as between plaintiff and defendant may according to circumstances be higher or lower than the market.[25] So where the assignees of a bankrupt sold fixtures on leased premises belonging to the plaintiff, for £36, a fair price on such sale,

South Carolina: Josey *v.* Wilmington & M. R. R., 11 Rich. 399.

Tennessee: Burke *v.* Louisville & N. R. R., 7 Heisk. 451.

Texas: Gulf, C. & S. F. Ry. *v.* Keith, 74 Tex. 287.

Vermont: Gray *v.* Stevens, 28 Vt. 1.

Canada: Maxwell *v.* Crann, 13 Up. Can. Q. B. 253; Sweeney *v.* Port Burwell Harbour, 17 Up. Can. C. P. 574.

[20] Coolidge *v.* Choate, 11 Met. (Mass.) 79.

[21] Smith *v.* Zent, 83 Ind. 86.

[22] Gilliam *v.* Globe Tailoring Co., 152 Mo. App. 414, 133 S. W. 628. See *ante*, §§ 59–62.

[23] *United States:* Pacific Ins. Co. *v.* Conard, 1 Bald. 138.

Massachusetts: Gardner *v.* Field, 1 Gray, 151.

New York: Marcus *v.* Stein (Misc.), 84 N. Y. Supp. 970.

[24] Brown *v.* Allen, 35 Ia. 306.

[25] *Ante*, § 252.

but it was shown that, as between incoming and outgoing tenant, the value would have been £80, it was held that the plaintiff was entitled to recover the latter sum.[26] So where a horse was specially fitted for the business in which he was being used, its value for such use could be recovered.[27] And where it was shown that a horse could not have been sold for more than twenty dollars, but was doing work for which another horse could not be bought for less than thirty-five dollars, the latter amount should be recovered for its destruction.[28] And, in general, the value of a thing is its value for the most valuable use for which it is adapted.[29]

§ 434. Value, when and where estimated.

The question as to the time when the value is to be computed, whether at the time of the illegal act, or at any subsequent period, if the value has fluctuated, presents itself in actions of trespass. In Crouch *v.* London & North Western Railway,[30] it seems to have been assumed that the period fixing the right of the parties was that of the trespass, and it has been so stated by the Supreme Court of New York; [31] and this is now the established rule.[32] Where defendant's cattle destroyed plaintiff's corn, the measure of damages was held to be the value of the corn at the time of the trespass, and not the value it would have had if it had matured.[33] And where ice in an ice-house was destroyed, the value of the ice at that time is recoverable, though a large part of it would have melted before use.[34]

The value is to be taken at the place of injury; and if there is

[26] Thompson *v.* Pettitt, 10 Q. B. 101.

[27] Farrel *v.* Colwell, 30 N. J. L. 123.

[28] Seavey *v.* Dennett, 69 N. H. 479, 45 Atl. 247.

[29] *Indiana:* Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682 (work horse).

Montana: Parrin *v.* Montana Cent. Ry., 22 Mont. 290, 56 Pac. 315 (dairy stock).

Nevada: Watt *v.* Nevada Central R. R., 23 Nev. 154, 44 Pac. 423 (hay kept against a hard winter).

[30] 2 C. & K. 789.

[31] Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144.

[32] *United States:* Pacific Ins. Co. *v.* Conard, 1 Bald. 138.

Connecticut: Hubbard *v.* New York, N. H. & H. R. R., 70 Conn. 563, 40 Atl. 533.

Kentucky: Schulte *v.* Louisville & N. R. R., 128 Ky. 627, 108 S. W. 941.

Maine: Brannin *v.* Johnson, 19 Me. 361.

[33] Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

[34] Hubbard *v.* New York, N. H. & H. R. R., 70 Conn. 563, 40 Atl. 533.

there no market, the basis of value is its value at the nearest market. To this should be added the cost of transportation, if the article is needed for use at the place of injury, or from it should be subtracted such cost if the article was to be sent away and sold.[35]

§ 435. Injury less than destruction.

Where a trespass upon the property of the plaintiff results in a less injury than destruction or deprivation of the property, the rule stated does not apply; the difference in value of the property before and after the injury is usually the measure.[36] Thus where the goods of the plaintiff were seized by the defendant, but the plaintiff's possession was not disturbed and he continued to have the use of them, his damages are the amount of his injury.[37] Where the plaintiff's property was taken out of his possession, and afterwards returned to him, he may recover compensation for injury to the property.[38] So if the plaintiff's animal is killed by the defendant, since the carcass remains the plaintiff's property, his recovery is limited to the difference in value between the live animal and the carcass.[39]

So where the defendant's bull entered plaintiff's pasture and covered plaintiff's heifer, which was a blooded animal and was

[35] *Illinois:* Chicago G. W. Ry. *v.* Gitchell, 95 Ill. App. 1.

Nevada: Watt *v.* Nevada C. R. R., 23 Nev. 154, 44 Pac. 423.

See *ante*, § 247.

[36] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Michigan: Davidson *v.* Michigan C. R. R., 49 Mich. 428.

Missouri: Cottrell *v.* Russell, 21 Mo. App. 1.

Nebraska: Chicago, B. & Q. R. R. *v.* Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824; Hespen *v.* Union Pac. R. R., 82 Neb. 495, 118 N. W. 98.

New Hampshire: Sinclair *v.* Tarbox, 2 N. H. 135.

Oklahoma: Tuttle *v.* Kent, 12 Okla. 674, 73 Pac. 310.

[37] Bayliss *v.* Fisher, 7 Bing. 153.

[38] *Iowa:* Turner *v.* Younker, 76 Ia. 258.

Michigan: Haviland *v.* Parker, 11 Mich. 103.

New York: Barber *v.* Dewes, 101 App. Div. 432, 91 N. Y. Supp. 1059.

Pennsylvania: Hyde *v.* Kiehl, 183 Pa. 414, 38 Atl. 998.

Wisconsin: Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214.

Canada: Benson *v.* Connor, 6 Up. Can. C. P. 356.

[39] *Alabama:* Georgia P. R. R. *v.* Fullerton, 79 Ala. 298; Memphis & C. R. R. *v.* Hembres, 84 Ala. 182.

Missouri: Case *v.* St. Louis & S. F. R. R., 75 Mo. 668; Harrison *v.* Missouri P. Ry., 88 Mo. 625.

North Carolina: Roberts *v.* Richmond & D. R. R., 88 N. C. 560; Boing *v.* Raleigh & G. R. R., 91 N. C. 199; Godwin *v.* Wilmington & W. R. R., 104 N. C. 146.

to have been covered by a high-bred bull, the measure of damages for trespass on the heifer was the difference in her value before and after the trespass; in which was to be considered the difference in value of the calf, and the effect, if any, on her future calves.[40] And where a mare with foal was so injured as to drop her foal prematurely, the measure of damages was the reduction in value of the mare by loss of her foal.[41]

When, however, the injury is capable of repair at a reasonable expense, that is, at an expense less than the diminution in value of the property as injured, the diminution in value cannot be recovered, but plaintiff's damages are limited to the cost of repair.[42]

§ 435a. Loss of use and expense of maintenance.

Where an injury to plaintiff's property which does not cause its total destruction results in his losing the use of it for a time, either because it is rendered unfit for use or because he is temporarily deprived of the possession of it, he may in addition to the deterioration in value recover the value of the use of it during the time he lost the use,[43] and the expense of its maintenance, if he was at such expense.[44] But if the plaintiff recovers the full value of the property, as for a complete destruction, he cannot also recover the value of the use.[45]

[40] Kopplin *v.* Quade, 145 Wis. 454, 130 N. W. 511.

So where defendant's ram covered plaintiff's ewe, so that she was got with lamb out of season, the measure of damages was the difference in her value for breeding and other purposes before and after the trespass. Stearns *v.* McGinty, 8 N. Y. Supp. 216, 55 Hun, 101.

[41] Baker *v.* Mims, 14 Tex. Civ. App. 413, 37 S. W. 190.

[42] *Mississippi:* Cue *v.* Breeland, 78 Miss. 864, 29 So. 850.

Washington: West *v.* Martin, 51 Wash. 85, 97 Pac. 1102.

[43] *Georgia:* Atlanta & W. P. R. R. *v.* Hudson, 62 Ga. 679.

Iowa: Turner *v.* Younker, 76 Ia. 258.

Michigan: Haviland *v.* Parker, 11 Mich. 103.

Missouri: Streett *v.* Laumier, 34 Mo. 469; Missouri R. P. Co. *v.* Hannibal & St. J. R. R., 79 Mo. 478.

Washington: West *v.* Martin, 51 Wash. 85, 97 Pac. 1102.

Wisconsin: Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

Canada: Benson *v.* Connor, 6 Up. Can. C. P. 356.

As an alternative, plaintiff may show the cost of a substitute necessarily hired to take the place of the property injured. Chaperon *v.* Portland G. E. Co., 41 Ore. 39, 67 Pac. 928.

[44] Gould *v.* Merrill Ry. & L. Co., 139 Wis. 433, 121 N. W. 161.

[45] *United States:* Ft. Pitt Gas Co. *v.* Evansville Contract Co., 123 Fed. 63, 59 C. C. A. 281.

§ 436. Consequential damages.

As a rule, when interest is given, this represents the sum total of redress for the *consequences* of the loss, and hence consequential damages, as such, are not recoverable.[46]

In Maine, in an action of trespass *de bonis asportatis*, it was ruled, at the trial, that the jury should give the value of the property at the time it was taken, and *something for the detention*. But, on motion for a new trial, the court said:

"For an injury done to property, such as is this case, the value of the property at the time of the injury is the measure of damages. There may be circumstances enhancing that value to the party injured, which may be properly taken into account. To the value here, interest might be added as a part of the plaintiff's indemnity. But as the term *interest* was not used, and probably not intended as the limit of damages for *detention*, the jury were at liberty to go into an estimate of the probable or speculative loss the plaintiff might have sustained on this ground. In our judgment, the instruction was too vague and loose, and had a tendency to mislead the jury." [47]

So, in Texas, in an action for tortious conversion analogous to that of trover, where, although there was no other evidence of damage than the value of the property, and no proof of fraud, violence, or malice, yet the jury had given double the value, the verdict was set aside.[48]

So, in trespass for taking corn, it will not be permitted the plaintiff to show that, in consequence of the alleged illegal act, he was obliged to work as a day laborer, to obtain the means to purchase more corn. "Such testimony," says the Supreme Court of Alabama, "tends to establish a criterion of damages too remote and disconnected with the act done, and supposes the rule to fluctuate according to the poverty of the plaintiff." [49] So, again, in trespass for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, it was held in the English Queen's Bench, that the plaintiff could not claim, as part of the damage,

Alabama: Fail *v.* Presley, 50 Ala. 342.

Wisconsin: Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60.

[46] *United States:* Pacific Ins. Co. *v.* Conard, 1 Bald. 138.

Iowa: Thomas *v.* Isett, 1 Greene, 470.

[47] Brannin *v.* Johnson, 19 Me. 361.

[48] Smith *v.* Sherwood, 2 Tex. 460.

[49] Sims *v.* Glazener, 14 Ala. 695.

his costs incurred in vacating the warrant of attorney and judgment; Lord Denman saying: "The plaintiff might have recovered these costs in a proper form of proceeding, but he cannot sue the defendant for a trespass *per quod* he was put to expense in removing the cause of the trespass." [50]

A verdict for profits which might have been made on the goods wrongfully taken, in addition to their value, is erroneous.[51] Nor can the plaintiff recover for injury to his business caused by loss of use of the property destroyed.[52]

Where, however, the property was actually in use at the time it was destroyed, the plaintiff may recover compensation for the damage caused by the loss of it up to the time when he could replace it. So where the driver of a street-car negligently attempting to pass the horse and wagon of an expressman, which had been temporarily left in the city street near the curbstone, the car was brought into contact with the wagon, and the horse, having been thrown in consequence on the curbstone and against a tree, received a fatal injury, compensation for the loss of the profits of the plaintiff's business during the time reasonably necessary to enable him to select another horse, was allowed to be included in the damages recovered by him.[53] And where a wagon in which plaintiff was actually on his way to market to buy goods with which to fill orders for customers was disabled by defendant's fault, it was held that plaintiff might recover what he lost by his inability to fill the orders in time.[54]

Mental suffering does not ordinarily result from a wrongful

[50] Holloway *v.* Turner, 6 Q. B. 928.

[51] *California:* Butler *v.* Collins, 12 Cal. 457.

Kentucky: Ludlow *v.* Steffen, 19 Ky. L. Rep. 1671, 44 S. W. 1119.

Michigan: Quay *v.* Duluth, S. I. & A. Ry., 153 Mich. 567, 116 N. W. 1101, 18 L. R. A. (N. S.) 250.

But see *Oklahoma:* Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310.

[52] *Alabama:* Nelms *v.* Hill, 5 So. 344.

Maine: McLaughlin *v.* Bangor, 58 Me. 398.

Montana: Parrin *v.* Montana Cent. Ry., 22 Mont. 290, 56 Pac. 315.

Nevada: Watt *v.* Nevada C. R. R., 23 Nev. 154, 44 Pac. 423.

See, however, Parks *v.* Sullivan, 46 Colo. 340, 104 Pac. 1035, where the refusal of recovery in such a case was placed on the ground that the loss was not proved with sufficient certainty.

[53] *Michigan:* Quay *v.* Duluth, S. I. & A. Ry., 153 Mich. 567, 116 N. W. 1101, 18 L. R. A. (N. S.) 250.

New York: Albert *v.* Bleecker St. R. R., 2 Daly, 389.

[54] Graves *v.* Baltimore & N. Y. Ry., 76 N. J. L. 362, 69 Atl. 971.

seizure of personal property, and in an action for such a seizure compensation for mental suffering cannot be recovered.[55] But in an exceptional case mental suffering may naturally result, and compensation for it may be recovered; as where defendant maliciously hit plaintiff's mare with an axe.[56]

§ 437. Expense of avoiding consequences.

The reason of this rule does not, however, apply in all cases. It will often happen where the injury is less than a total destruction, or where there is a doubt whether it will amount to total destruction, that consequential damages will be allowed. Under this head would fall all allowances for expenses incurred by the plaintiff in an attempt to avoid the consequences of the trespass.[57]

So in New York it has been held that in an action on the case for the wrongful detention of personal property, the plaintiff might recover damages for the time lost and expenses incurred in pursuit of the property.[58] In an action for injury to cattle which necessitated their being killed, it was held that the plaintiff was entitled to a reasonable allowance for his time and trouble in disposing of them, and should be charged with the net proceeds realized, or which might have been realized, after deducting such allowance.[59] And so the cost of selecting a part of cotton bales which was not injured and shipping the same to market should be added to the difference in value.[60]

Where the expense incurred results in diminishing the loss, the defendant, being chargeable with the expense, is of course

[55] *Nebraska:* Henderson *v.* Weidman, 88 Neb. 813, 130 N. W. 579.

North Carolina: Chappell *v.* Ellis, 123 N. C. 259, 31 S. E. 709, 68 Am. St. Rep. 822.

[56] Kimball *v.* Holmes, 60 N. H. 163.

[57] *Indiana:* Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299 (expense of cure of animal).

New Hampshire: Seavey *v.* Dennett, 69 N. H. 479, 45 Atl. 247 (expense of care of animal).

Pennsylvania: Hyde *v.* Kiehl, 183 Pa. 414, 38 Atl. 998 (expense of recovery.)

Wisconsin: Plunkett *v.* Minneapolis, S. S. M. & A. Ry., 79 Wis. 222, 48 N. W. 519 (expense of curing animal); Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214 (expense of recovery).

[58] Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223; *acc.*, Watson *v.* Boswell, 25 Tex. Civ. App. 377, 61 S. W. 407.

[59] Dean *v.* Chicago & N. W. Ry., 43 Wis. 305.

[60] Texas & P. Ry. *v.* Levi, 59 Tex. 674.

entitled to the benefit of it; and if he is still called upon to make compensation for a diminution in value, it is for the difference between the value before the injury and after the final recovery of the property.[61]

§ 438. Damages may exceed entire value of property.

Since consequential damages may in some cases be recovered, it is obvious that the damages may in some cases exceed the entire value of the property injured or destroyed, with interest.[62] This not infrequently happens in cases of attempts to avoid loss. The rule that the expense of a reasonable attempt to repair the injury may be recovered is not limited to cases where the attempt was successful; if the attempt was a reasonable one, the expense of it may be recovered, although in spite of it the property proved a total loss. In that case, the expense of the attempted repair or cure is recoverable in addition to the value of the property.[63]

III.—Fraud

§ 439. False representations.

Where the plaintiff suffers pecuniary injury through the loss of personal property by the fraud of the defendant, instead of by force, the general principles are the same. The damages recoverable are those which naturally flow from the fraud.[64] Here as in other cases of torts the rule of compensation is to put the party defrauded back into the condition in which he was before the wrong was done. Hence, in case of false repre-

[61] Solomon *v.* New York City Ry., 56 Misc. 502, 107 N. Y. Supp. 744.

[62] Shibley *v.* Gendron, 25 R. I. 519, 57 Atl. 304.

See, however, a contrary intimation in Atlanta I. & C. Co. *v.* Mixon, 126 Ga. 457, 55 S. E. 237.

[63] *United States:* The Henry Buck, 39 Fed. 211.

Georgia: Atlanta & W. P. R. R. *v.* Hudson, 62 Ga. 679; Central R. R. *v.* Warren, 84 Ga. 329.

Illinois: Hey *v.* Hawkins, 120 Ill. App. 483.

Maine: Watson *v.* Lisbon Bridge Co., 14 Me. 201.

Massachusetts: Gillett *v.* Western R. R. Corp., 8 All. 560; Atwood *v.* Forwarding, etc., Co., 185 Mass. 557, 71 N. E. 72.

Missouri: Streett *v.* Laumier, 34 Mo. 469; Missouri R. P. Co. *v.* Hannibal & S. J. R. R., 79 Mo. 478.

Texas: Gulf, C. & S. F. Ry. *v.* Keith, 74 Tex. 287.

Canada: Sweeney *v.* Port Burwell Harbour, 17 Up. Can. C. P. 574.

See *ante*, § 226*a*.

[64] *Maryland:* Buschman *v.* Codd, 52 Md. 202.

Mississippi: Estell *v.* Myers, 54 Miss. 174.

sentations, relied on by the plaintiff to his detriment, the measure of recovery is not the difference between the plaintiff's pecuniary condition if the representations had been true and his condition under the actual facts, but rather the difference between what the plaintiff had before he acted on the representation and what he had afterward. This represents his actual loss. The action is for the recovery of pecuniary damages. Thus in an action for a false representation, by which the plaintiff was alleged to have been compelled to pay £2,000, and thereby became bankrupt, and suffered great annoyance and inconvenience, the only damage recoverable was the direct pecuniary loss, the right to which passed to the assignees.[65]

The general rule that damages must be actual, and not contingent, or speculative, may prevent recovery in actions for deceit. Thus for false representations in a transfer of property where the only consideration was the payment by the plaintiff of an existing debt, recovery was denied on the ground that he had suffered no certain loss.[66] Where one was induced to indorse a note, in ignorance of the legal effect of an indorsement, but failed to show that he had been compelled to pay the note, the court denied a recovery on the ground that the damages were contingent.[67]

It is, however, to be remembered that in equity fraud is a sufficient cause for setting aside a transaction, and giving the defrauded party his choice of recovering a consideration that he has paid or of claiming the benefit of any profit the defendant may have made by means of his fraud; and this profit may sometimes be given by way of damages.

The varieties of fraud are infinite; and numerous examples are necessary in order to follow the operation of the principles just examined. We now proceed to consider such examples.

§ 439a. Fraud in procuring a contract.

The general rule is that where a fraud is perpetrated in procur-

[65] Hodgson *v.* Sidney, L. R. 1 Ex. 313.

[66] Brown *v.* Blunt, 72 Me. 415.

[67] Freeman *v.* Venner, 120 Mass. 424.

It is to be observed that in all actions for deceit, damage, to be recoverable, must be produced by the deceit. Falsehood or deception are not in themselves actionable. Ansbacher v. Pfeiffer, 13 N. Y. Supp. 418. *Cf.* Bigelow on Torts (7th Ed.), 110.

ing the execution of a contract the defrauded party may either rescind and recover the consideration, or may affirm the contract, perform it on his side, and maintain an action for the damages suffered through the fraud. Thus where the owner of property is induced by false representations as to its quality or value, etc., to sell it to the defendant, he may affirm the sale and recover from the vendee the difference between the price paid by the vendee and the actual value of the property in its real condition.[68] It has been held in Massachusetts, in an action on the case, where the defendant, being part owner of a vessel, by fraudulent representations persuaded the attorney of the plaintiff, during his absence, to sell him the vessel at a less price than its value, and he afterwards himself sold it for a greater price, that if the latter sale was an actual sale, the sum realized at it would be the proper measure of damages; "because it would be unjust to permit the fraudulent party to retain the fruits of his fraud," and because the plaintiff, if not deceived, might have obtained the larger sum. But the court allowed the defendants to show that the price which they paid was the true and full value of the plaintiff's share, both in order to disprove the fraud, and as proper for the consideration of the jury on the question of damages.[69]

The general rule may, however, be varied by special circumstances. The owner of shares in a corporation received two offers, of which the defendant had notice, one of eighty dollars cash per share, the other of fifty dollars cash and fifty dollars additional if the corporation should pay a certain divi-

[68] *Arkansas:* McDonough *v.* Williams, 77 Ark. 261, 92 S. W. 783.

Colorado: Vivian *v.* Allen, 9 Colo. App. 147, 47 Pac. 844.

Massachusetts: Matthews *v.* Bliss, 22 Pick. 48.

Michigan: McMillan *v.* Reaume, 137 Mich. 1, 100 N. W. 166.

Nevada: Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New York: Bench *v.* Sheldon, 14 Barb. 66.

Pennsylvania: Weaver *v.* Cone, 12 Pa. Super. Ct. 143.

Texas: Ellis *v.* Barlow (Tex. Civ. App.), 26 S. W. 908.

Wisconsin: Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

Nominal damages at least may be recovered. Isman *v.* Loring, 115 N. Y. Supp. 933, 130 App. Div. 845.

[69] Matthews *v.* Bliss, 22 Pick. (Mass.) 48. This decision assumes that the object of the jury was merely to give compensatory damages: because, as we have already said, fraud is a case for vindictive or exemplary damages, where such damages are allowed.

dend, and, relying on the defendant's representations as to the financial condition of the company, accepted the second offer; the expected dividend was not declared, and consequently the second fifty dollars was not paid: in an action for the deceit the seller recovered the difference between eighty and fifty dollars.[70]

In a case in Illinois, where the owner of land was induced to sell it for a price less than its actual value, by a false representation of the buyer that the seller's interest was only a life estate, the court held the measure of damages to be the difference between the value of the interest actually conveyed and the value of a life estate in the property conveyed. The court said, "if the defendant purchased the life estate for less than it was actually worth he is entitled to the benefit of his bargain." [71] Such a holding does not accord with the general rule of damages for fraud. The defrauded plaintiff is entitled to be put back into as good a position as he was in before the wrong. The alternative remedies of rescission and an action of deceit are the methods of accomplishing this result, but the compensation under either remedy should be substantially the same; otherwise one remedy would not exactly compensate the injured person. The nearest possible equivalent to getting the property back is to realize its actual value; hence it would seem to be the correct rule, in an action of deceit, to award the difference between the value and the amount already received. Though the rule of damages adopted in the Illinois case has been accepted by the weight of American authority in case of false representations by the vendor, the reasons which sustain it in such a case do not apply where the vendee was fraudulent, as will appear later.[72]

When the misrepresentation does not relate to the quality of the thing sold, but is confined to a collateral matter, the general rule for measuring damages is not so difficult of application. Thus when the vendee induced the sale of a slave at a special price by a fraudulent promise to take the slave out of the State, and where the facts sustained an action of deceit, the vendor

[70] Rothmiller *v.* Stein, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148.

[71] Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252.

[72] Ch. xxxv, §§ 777 *et seq.*

recovered the difference between the actual value of the slave and the reduced price.[73]

§ 439b. Fraud in effecting a sale.

Where one is induced to purchase property by the false representations of the vendor, he may either rescind the sale, or retain the property and sue for the fraud. If the form of action were respected, the measure of damages in the latter case would be the difference between the price paid and the actual value of the thing sold. This would put the vendee in substantially the same position in which he was before the tort was committed. By the weight of authority, however, the measure of recovery is the difference in value between the thing sold in its actual condition and if it had been as represented.[74] When a lease was effected through false representations as to the furnace and the requirements for heating, it was held that the plaintiff has a right to continue in occupation, paying the rent, and then sue for his damages, which would be the difference in the rental value of the premises as they were, and as they would have been if as represented; in all such cases the plaintiff may waive his right to damages by acquiescence, but this will generally be a question of fact.[75]

§ 439c. Fraud in inducing a contract of insurance.

Where by the defendant's fraudulent representations the plaintiff was induced to take out a policy of insurance, which he surrendered upon discovering the fraud, the measure of damages is the amount of premiums paid, without deduction.[76] In

[73] Oldham *v.* Bentley, 6 B. Mon. (Ky.) 428.

But see McCready *v.* Phillips, 56 Neb. 446, 76 N. W. 885.

[74] The subject is more fully treated in ch. xxxv on Sales of Personalty at §§ 777 *et seq.*, and in ch. xliii on Sales of Real Estate at §§ 1027 *et seq.*

[75] Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123.

[76] *Iowa:* Van Werden *v.* Equit. Life Assur. Soc., 99 Ia. 621, 68 N. W. 892.

Massachusetts: Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25 (*semble*).

New York: Rohrschneider *v.* Knickerbocker L. I. Co., 76 N. Y. 216, 32 Am. Rep. 298; May *v.* N. Y. S. R. F. Soc., 14 Daly, 389, 13 N. Y. St. 66.

North Carolina: Sykes *v.* Life Ins. Co., 148 N. C. 54, 61 S. E. 610; Caldwell *v.* Ins. Co., 140 N. C. 100, 52 S. E. 252; Briggs *v.* Life Ins. Co. (N. C.), 70 S. E. 1068.

England: Kettleworth *v.* Refuge Assur. Co., [1908] 1 K. B. 545.

See also Butler *v.* Prentiss, 158 N. Y. 49, 64, 52 N. E. 652.

a recent Vermont case,[77] it was held that from this amount should be deducted the value of the insurance to the plaintiff between the date of the policy and the date when he elected to rescind. The court said:

"The general rule is that the party who would rescind a contract on account of fraud practiced upon him by the other party must seasonably return the property to him and put him *in statu quo*. If the plaintiff in this case has received dividends upon his policy the law would not permit him to recover the premiums and retain the dividends for then the other party would not be placed *in statu quo*. The plaintiff had received no dividends to be returned, but he had been insured for a year and a half before he rescinded the contract, and if he had died within that time his estate would have received $5,000 from the insurance company; so it cannot be held as a matter of law that he had received no benefit from the contract."

The dispute seems to turn on the question of what "*in statu quo*" means. If it means that the plaintiff must surrender or give an equivalent for, whatever benefit he has received under the contract which he seeks to rescind, the Vermont case is right. If, however, as seems to be the better view, it means that the defendant must be put back into his original position, the other rule is correct. The fact that the defendant was under a contingent liability is thus immaterial, since upon rescission such liability is wiped out and the defendant's pecuniary condition unchanged thereby.

§ 439d. Fraud in procuring a conveyance.

Where the defendant secured by fraud a conveyance of the plaintiff's land, the measure of damages is the value of the land at the time of the conveyance,[78] or if value was given for the land, the difference between the actual value of the land conveyed and the consideration received.[79] Where the defendant

[77] McKinley *v.* Drew, 69 Vt. 210, 71 Vt. 138, 37 Atl. 285.

[78] *Michigan:* Woolenslagle *v.* Runals, 76 Mich. 545.

Texas: Butler *v.* Anderson (Tex. Civ. App.), 107 S. W. 656.

[79] *Kentucky:* Campbell *v.* Kerrick, 134 S. W. 186.

Missouri: Boyce *v.* Gingrich (Mo. App.), 134 S. W. 79.

Wisconsin: Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88.

So of fraud in procuring a sale of personalty. Johnson *v.* Culver, 119 Ind. 277, 19 N. E. 129.

fraudulently induced the plaintiff to mortgage his farm to one A for a certain sum, and the defendant agreed with A to have the amount applied on an old indebtedness from the defendant to A, so that the plaintiff got nothing, the measure of damages was the amount of the mortgage, with interest.[80] And where the grantee's agent fraudulently induced the plaintiff to sign a deed by the false representation that certain timber was excepted from the grant, the measure of damages was the value of the timber.[81]

§ 439e. Fraud in securing a loan.

Where by the fraud of a bank officer plaintiff was induced to deposit money in an insolvent bank, the measure of recovery is the amount of the deposit, less the value of his claim against the bank.[82] And the same rule applies where a private loan was fraudulently induced.[83]

Where the plaintiff was defrauded into making a loan on a mortgage of land which was worth less than the loan, the measure of damages is the difference between the loan and the value of the land.[84]

Where one had been induced by the fraudulent representations of another's creditor to take from the debtor certain goods and give the creditor his own note for the debt, and it proved that the goods were worth much less than represented, but it did not appear whether the defendant had received them by way of absolute purchase or as collateral security only, the instruction of the judge to the jury to find for the defendant if the difference in value between the goods as represented and their actual value equalled the balance due on the note, which would have been the rule in the case of an absolute sale, was held inapplicable and therefore erroneous, because if the goods were taken as security only, the defendant should have been

[80] Forbes *v.* Thomas, 22 Neb. 541. The plaintiff was not allowed to recover the value of his farm, though the mortgage had been foreclosed.

[81] Griffin *v.* Roanoke R. & L. Co., 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463.

[82] *New Jersey:* Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

Texas: Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

[83] Browning *v.* Nat. Capital Bank, 13 D. C. App. Cas. 1.

[84] Briggs *v.* Brushaber, 43 Mich. 330.

held to account on the note for what they were worth.[85] Where, by false representations as to the value of the security, the plaintiff was induced to loan money to the defendant, and the defendant in fact had no title to the property given as security, the measure of recovery is the amount of the loan with interest.[86]

§ 439f. Misrepresentation of credit of a third party.

Where the defendant falsely represented a third party to be of good credit, whereupon the plaintiff sold him goods on credit and was unable to recover the price, the measure of damages is the value of the goods supplied,[87] less the value of any collateral security.[88] The rule is not varied by the fact that the plaintiff was a manufacturer and that the market value of the goods included a manufacturer's profits.[89]

§ 439g. Fraud in obtaining payment of debt owed another.

A judgment debtor was induced to give a note for the amount of the judgment to one who represented himself to be the owner of the judgment. This note was negotiated and paid. The plaintiff recovered from the fraudulent person the amount paid on the note, though the rightful owner of the judgment did not attempt to enforce it.[90] The defendant represented that he was the owner of a bond and mortgage given by the plaintiff which was then overdue. Plaintiff paid defendant one hundred and twenty dollars upon his agreeing to carry the bond and mortgage for a year. Defendant did not own the mortgage, but by paying the owner one hundred dollars induced him to carry it for a year. The plaintiff was held entitled to recover the twenty dollars which he had paid the defendant over and above what the defendant had paid the creditor.[91]

[85] Stevenson *v.* Greenlee, 15 Ia. 96, and see, Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383.

[86] Horne *v.* Walton, 117 Ill. 130, 141, 7 N. E. 100, 103; Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102. *Cf.* Emmerson *v.* Dardanelle Bank, 66 Ark. 646, 52 S. W. 274.

[87] *Massachusetts:* Kidney *v.* Stoddard, 7 Met. 252.

New York: Bean *v.* Wells, 28 Barb. 466; Von Bruck *v.* Peyser, 4 Rob. 514.

[88] American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

[89] Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

[90] Goring *v.* Fitzgerald, 105 Iowa, 507, 75 N. W. 358. See also Lahay *v.* City Nat. Bank of Denver, 15 Colo. 339, 25 Pac. 704.

[91] Saunders *v.* Chamberlain, 13 Hun (N. Y.), 568.

§ 439h. Fraud in dealings with corporate stock.

Where by the defendant's false representations the plaintiff is induced to subscribe to bank stock and to give his bond to secure the subscription, the bank being insolvent and the bond having been assigned for value, the measure of damages is the amount of the subscription, though it is as yet unpaid.[92] A corporation issued stock to the defendant upon a forged power of attorney; the owner sued the corporation, which notified the defendant, and the owner recovered. The corporation now sued the defendant, and the measure of damages was held to be the value of the stock at the termination of the former suit, the expenses of that suit, and the dividends which had been paid to the defendant.[93] In case of a fraudulent overissue of stock by the defendant's agent, the measure of damages is the value of the stock at the time the defendant refused to recognize it as valid.[94] Where the plaintiff in such a case is a broker who had sold the stock for the agent of the defendant and had been obliged to take it up on the customary broker's guaranty of genuineness, he may recover the amount he received upon the sale.[95] And where defendant made a fraudulent invoice of stock for the purpose of incorporation, he was liable to a purchaser of the stock for the difference between the actual value of the stock and the value as he represented it.[96]

§ 439i. Fraud by promoter of a joint enterprise.

Where the defendant proposed to the plaintiff a joint purchase of land and falsely represented that the price was $8,000, whereas it was in fact but $3,000, and the plaintiff paid $4,000 for a half interest, the plaintiff in an action for the fraud recovered the amount paid in excess of his share of the actual price; and the fact that the land was actually worth more than the represented price was held immaterial.[97] So, where one

[92] Hubbard *v.* Briggs, 31 N. Y. 518.

[93] Boston & A. R. R. *v.* Richardson, 135 Mass. 473.

[94] Allen *v.* South Boston R. R., 150 Mass. 200, 22 N. E. 917.

[95] Jarvis *v.* Manhattan B. Co., 53 Hun (N. Y.), 362.

[96] Smith *v.* Owsley, 102 S. W. 277, 31 Ky. L. R. 432.

[97] *Colorado:* Mayo *v.* Wahlgreen 9 Colo. App. 506, 5 Pac. 40.

Illinois: Bunn *v.* Schnellbacher, 163 Ill. 328, 45 N. E. 227.

Iowa: Johnson *v.* Gavitt, 114 Iowa, 183, 86 N. W. 256.

Wisconsin: Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

party to a joint purchase got a secret rebate from the seller, the other party was entitled to recover his share of the rebate.[98] And where a promoter of a corporation, who sold its property for stock, realized secret profits, the measure of damages is the difference between the value of the stock issued to him and the property conveyed.[99]

§ 439j. Fraud in procuring marriage.

If a marriage is induced by the fraud of a third person, suit may be maintained for the damages occasioned. When the fraud consists of false representations as to the financial condition of the other spouse the usual rule of damages for torts is difficult to apply, for, from the nature of the case, it is not possible to put the plaintiff *in statu quo*, and the monetary equivalent of that status cannot be ascertained with any degree of accuracy. It has, accordingly, been held that the fraudulent person is bound to make good his representations, and the difference between the actual and represented finances of the other spouse is the measure of damages.[100] Where, by a conspiracy between a woman and one who had debauched her and made her pregnant, the plaintiff was induced to marry her in ignorance of the facts, the damages were held to include, not only loss of services, but also loss of *consortium*, because though the formal right to *consortium* may remain, the essential value of it is taken away. And the jury may of course give exemplary damages.[101]

§ 439k. Assignments in fraud of creditors.

Upon a fraudulent assignment of goods to a creditor, the measure of damages is the value of the goods at that time,[102] not what the defendant sold them for.[103] In an action brought

[98] Jones *v.* Kinney (Wis.), 131 N. W. 339.

[99] Old Dominion, C. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193.

[100] *New York:* Piper *v.* Hoard, 107 N. Y. 73, 76, 13 N. E. 626.

England: Montefiori *v.* Montefiori, 1 Wm. Black, 363.

[101] Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156, affirming 9 Misc. 34, 29 N. Y. Supp. 294.

[102] Burpee *v.* Sparhawk, 97 Mass. 342.

See Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900.

[103] *Michigan:* Robinson *v.* Boyd, 17 Mich. 128.

Texas: Oppenheimer *v.* Halff, 68 Tex. 409.

by plaintiffs as judgment creditors of defendant Cavanaugh, who had conspired with defendant Strauss to put his property out of reach of his creditors by transferring it to defendant Strauss, it was held that damages to the full amount of plaintiff's claim were proper.[104] The defendant "was a wrongdoer, and it lies not in his mouth to say that the property may still be taken under execution. It exceeds in value the plaintiff's judgment, and has been fraudulently appropriated by the defendant to his own use. It is just that he should pay the creditor whose claim he sought to defeat."

§ 440. Other frauds.

In Kentucky, where suit was brought for fraud in assigning a note for which the plaintiff had given certain property, the court held that the value of the property, and not the amount of the note, was the proper measure of damages; though they considered the precise amount to be recovered by the plaintiff a matter for the consideration and decision of the jury.[105] Where the defendant assigned a note and mortgage, and then fraudulently filed a certificate of satisfaction of the mortgage, the plaintiff's damages were held to be the value of the security, not exceeding the amount of the note.[106] Where defendant assigned a note secured by a mortgage, and then released the mortgage to one who had bought the land subject to the mortgage, and who then sold it to a *bona fide* purchaser, it was held in an action by the mortgagor that he could recover the amount of the note, although at the time of the commencement of the action the note had not been paid, the court saying that the defendant had fraudulently destroyed the security set apart by the plaintiff for the payment of the note.[107] If the owner of a promissory note of an insolvent maker by fraud sells it to an innocent purchaser he is liable to refund the money received for it with interest.[108]

At a sheriff's sale of the plaintiff's land, the defendant represented that he held an equitable mortgage on the land for $1,500. In fact the mortgage was for only $1,000. Defendant

[104] Quinby *v.* Strauss, 90 N. Y. 664.

[105] Crews *v.* Dabney, 1 Littell (Ky.), 278.

[106] Fox *v.* Wray, 56 Ind. 423.

[107] Ely *v.* Stannard, 46 Conn. 124.

[108] Clayton *v.* O'Connor, 35 Ga. 193.

in consequence of his misrepresentation was able to bid in the property at a figure lower than its actual value. Held, that the measure of damage is the difference between the price at which the land was bid in and what it would have brought but for the misrepresentation, with interest up to the time of trial.[109]

In an action to recover damages for fraudulently inducing the plaintiff to manufacture boxes, the measure of damages is the cost of manufacture.[110] Where by the representation of defendant that he was owner of a certain wood-lot plaintiff was induced to construct a logging road across the lot, and the road was obstructed, the plaintiff could recover the cost of building the road across the lot, and, it seems, of any other portion of road built to connect with it and rendered useless by the obstruction.[111] In an action by a sheriff against parties whose fraudulent representations had induced him wrongfully to seize the property of T, it was held that the measure of damages was the amount of T's judgment against the sheriff, with interest.[112] Where a creditor is fraudulently induced to compromise a claim he may recover the difference between the sum acutally received and the sum he would have received if he had not compromised.[113] Where an attorney by false representations induces a client to bring a useless suit, the damages recoverable are the expenses of the litigation.[114] Similarly, when a physician induces a patient to expend money for medical treatment by falsely representing his disease to be curable, the patient may recover, not the damages arising from not being cured, but the expenditures thus unnecessarily incurred.[115]

Where an employer represented to his workmen that in consideration of a deduction from their wages he was carrying accident insurance for their benefit, whereas in fact he was carrying indemnity insurance for his own, a workman in an action

[109] Denham *v.* Kirkpatrick, 64 Ga. 71.

[110] Rabinowitz *v.* Cohen, 17 N. Y. Supp. 502.

[111] Storseth *v.* Folsom, 50 Wash. 456, 97 Pac. 492.

[112] Kenyon *v.* Woodruff, 33 Mich. 310: the defendants defended T's suit for the sheriff.

[113] *Maine:* Buck *v.* Leach, 69 Me. 484.

Texas: Grabenheimer *v.* Blum, 63 Tex. 369.

But see *Michigan:* Walsh *v.* Sisson, 49 Mich. 423, 13 N. W. 802.

[114] Loof *v.* Lawton, 97 N. Y. 478.

[115] Hedin *v.* Minneapolis, M. & S. Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

for deceit is entitled to recover the amount so deducted, with interest.[116]

Where a mortgagee of chattels fraudulently represented to the mortgagor that if the latter would allow him to bid in the goods at foreclosure sale at a nominal price he would dispose of the goods at private sale and give the mortgagor the benefit of this sale, and the mortgagor in consequence allowed the goods to be sold, the measure of damages was the difference between the actual value of the goods and the price bid.[117] It was alleged that the defendant by fraud induced plaintiff, a mortgagor, not to pay interest on the debt, whereupon, the mortgagee having brought foreclosure, the plaintiff, not being able to pay the mortgage debt, sold the property at a sacrifice; it was held that he could at most recover the amount of foreclosure costs and attorney's fee, but not his loss by the sale.[118]

§ 441. Consequential damages.

The rules governing consequential damages are uniformly applied in cases of fraud as well as all others. So, in a case in England, where the defendant was sued for false representations in regard to the credit of his son, where it appeared that the plaintiffs had trusted the son for a length of time, and to an amount which might be considered ill-judged and excessive, even if the representations had been true, Tindal, C. J., charged the jury: "As to the damages, the verdict must be for such damage as is justly and immediately referable to the falsehood of the statement. The goods first purchased have been paid for, but six hundred pounds' worth since have not, and the son was made a bankrupt by the plaintiff in the month of October. You must say how much of this is justly and immediately referable to the false statement. That is a problem which you must solve for yourselves. I will only make an observation, and that is, if they give the son an indiscreet and ill-judging credit, they cannot, in fairness, call on the father to be answerable for the loss occasioned by it." [119] The language of the

[116] Williams *v.* Detroit, O. & C. Co. (Tex.), 123 S. W. 405.

[117] Cerny *v.* Paxton & Gallagher Co., 78 Neb. 134, 110 N. W. 882.

[118] Nearing *v.* Hathaway, 128 App. Div. 745, 113 N. Y. Supp. 318.

[119] Corbett *v.* Brown, 5 C. & P. 363; see Collins *v.* Cave, 6 H. & N. 131; affirming 4 H. & N. 225.

eminent judge is particularly deserving of notice; for if, in cases of this kind, the principles that exclude remote damages are not adhered to, the whole subject of remuneration would be in the hands of the jury.

Where the vendor of live-stock falsely represented that they were free from a certain infectious disease, he is liable for the value of other animals in the herd which caught the disease and died,[120] and for medical treatment for the same,[121] and, if the disease is communicated to a human being who dies, the vendor is liable for such death.[122] It has also been held that he is liable for the value of a stable which the vendee had to burn to prevent further contagion.[123] Where the plaintiff, a livery-stable keeper, had taken the defendant's horse to keep in his stable, relying on the defendant's representation that the horse was well, which was untrue, and the horse having the distemper, communicated it to two stallions of the plaintiff, who were thereby incapacitated for service during the season, it was held that evidence of what would have been their probable earnings during the season, but for the distemper, was proper for the consideration of the jury in estimating the damages.[124] In Sellar *v.* Clelland [125] it was held that the plaintiff could recover for cattle lost on a journey which he had been induced to take through the defendant's false representations, and could recover an exceptionally high price he had to pay to replace the cattle lost. The defendant fraudulently concealed the fact that a bull sold to the plaintiff was without the power of propagation, the purpose for which it was sold. Damages in an action of deceit were awarded for the diminution in value of the plaintiff's dairy resulting from the use of the bull, *i. e.*, the inferior quantity of butter in consequence of the cows not having been gotten with calf.[126] When the defendant falsely represented that he had authority to sell land, and the plaintiff, relying on the contract, converted into money a number of

[120] *Indiana:* Rose *v.* Wallace, 11 Ind. 112.

Kentucky: Faris *v.* Lewis, 2 B. Mon. 375.

[121] Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033.

[122] State *v.* Fox, 79 Md. 514, 527, 29 Atl. 601, 47 Am. St. Rep. 424, 24 L. R. A. 679.

[123] Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033.

[124] Fultz *v.* Wycoff, 25 Ind. 321.

[125] 2 Colo. 532.

[126] Maynard *v.* Maynard, 49 Vt. 297.

interest-bearing securities, in order to pay for the land on a certain day, the measure of damages was the legal rate of interest on the money, not the rate of interest which the converted securities bore.[127] In Fitzsimmons *v.* Chapman [128] the defendant represented to the plaintiff that a firm, having a large capital and business, could be induced, by the payment of a certain sum, to remove to the plaintiff's town, and, by their business, enhance the value of property in that place. The plaintiff subscribed a certain sum, and the firm moved. It turned out to be insolvent. It was held that damages from the fact that it did not enhance the value of property were too remote. The purchaser of a vessel, falsely and fraudulently represented by the seller as eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, and the vessel being afterwards condemned in a foreign port, it was held that the purchaser was entitled to recover his actual damages occasioned by sending her to sea, not exceeding her value.[129] Where a horse sold is represented as not being afraid of the cars, compensation may be recovered for property injured by the horse in running away from the cars.[130]

In the Normannia [131] the action was by a passenger for damages caused by false representations as to a voyage to the effect that the vessel would carry no steerage passengers, cholera contagion and detention in quarantine being at the time a natural consequence of carrying such passengers. Cholera did appear in the steerage and the owners were held liable for the ensuing damages. After detention for some days on the Normannia, the passenger was transferred to another vessel. For damages ensuing, the owners of the Normannia were held not responsible, other causes than the original deceit having intervened.

§ 442. Expenses.

Whether expenses incurred by the plaintiff are recoverable depends on the doctrine of proximate cause. Where the fraud

[127] Place *v.* Dodge, 54 Ill. App. 167.

[128] 37 Mich. 139.

[129] Tuckwell *v.* Lambert, 5 Cush. (Mass.) 23.

[130] Allen *v.* Truesdell, 135 Mass. 75.

[131] Beers *v.* Hamburg-American Packet Co., 62 Fed. 469.

was intended to induce the expenditure the plaintiff may recover.[132] Where a vendor by fraud induced the plaintiff to purchase a stallion for breeding purposes, and it proved to be sterile, the damages were held to include the cost of keeping the stallion a reasonable time for the purpose of testing him.[133] Where a draft was, by fraud, procured from a bank, and on discovery of the fraud the bank incurred expenses in attempting to stop payment in an action for the fraud, such expenses were held recoverable.[134]

On the other hand, where, as in Slingerland *v.* Bennett,[135] the defendant made fraudulent representations as to the responsibility of the maker of a note given by the defendant to the plaintiff in payment of a debt, it was held that the plaintiff could not recover the costs of an action against the maker, as these were not the proximate result of the fraud. So in Connecticut, in an action against the vendor of a horse for false representations, the plaintiff could not recover the expenses of keeping, previous to an offer to return the horse.[136] Where the defendant falsely represented that his horse had been damaged by reason of a defect in the highway, and the town thereupon incurred expenses in investigating the claim, in an action by the town for the fraud, recovery for such expenses was denied.[137]

[132] Norae *v.* Lonsley, 130 Fed. 17.

[133] Peak *v.* Frost, 162 Mass. 298, 38 N. E. 518.

[134] First Nat. Bank *v.* Williams, 62 Kan. 431, 63 Pac. 744.

[135] 66 N. Y. 611.

[136] West *v.* Anderson, 9 Conn. 107.

[137] Enfield *v.* Colburn, 63 N. H. 218.

CHAPTER XIX

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I.—Slander and Libel

§ 443. General rule.

We now come to a class of torts in which the injury is malicious, and the degree of injury, and therefore the measure of damages, depends to a great extent upon the nature and extent of the malice displayed by the defendant; and matters of aggravation and of mitigation become important. The first actions of this nature to be considered are actions for defamation—slander and libel.

* A very important line of demarcation exists in actions of slander between those defamatory words which are actionable *per se*, and from which damage is presumed to result, and those where, to sustain a suit, special damage must be averred and proved. As, for instance, damage is presumed if a clergyman is charged with intemperance or profligacy, a lawyer with dishonesty, a merchant with bankruptcy, or a physician with ignorance; while, on the other hand, if a charge of want of chastity is made against a woman, no action lies unless she can prove special damage.[1] But in this latter case slight damages have been held sufficient, and the loss of marriage is enough.[2] Into this distinction it is not proper more fully here to enter; but it is well to remark with reference to the subject of this treatise, that where the plaintiff undertakes to show special damage by the loss of customers in trade, he ought to state in his declaration the names of such customers,[3] and he cannot prove that any persons not named in his declaration left off dealing with him in consequence of the words spoken.[4] ** The direct injury suffered from slander or libel is to the reputation; and compensation for injured reputation is therefore the principal item of damages in an action for such an injury.[5] But

[1] Bradt *v.* Towsley, 13 Wend. (N. Y.) 253.

[2] *New York:* Moody *v.* Baker, 5 Cow. 351.

Texas: Linney *v.* Maton, 13 Tex. 449.

Expensive illness caused by the charge, and resultant loss of time, have been held special damage.

New York: Fuller *v.* Fenner, 16 Barb. 333.

Texas: McQueen *v.* Fulghan, 27 Tex. 463.

Vermont: Underhill *v.* Welton, 32 Vt. 40.

Contra, England: Allsop *v.* Allsop, 5 H. & N. 534.

[3] Hartley *v.* Herring, 8 T. R. 130.

[4] Hallock *v.* Miller, 2 Barb. (N. Y.) 630.

[5] *Delaware:* Todd *v.* Every Evening Pr. Co., 6 Pennew. 233, 66 Atl. 97.

another direct result of defamation is mental suffering on the part of the person defamed; and in an action for slander or libel a plaintiff may recover compensation for mental suffering.[6] Where partners sue jointly for an attack upon them as such, damages will include only the loss sustained in trade, and not injury to their private feelings;[7] and where a corporation sues for libel, since a corporation cannot suffer mentally, it can recover nothing for mental suffering.[8]

There is but one recovery for all damages in libel or slander; the jury may, accordingly, properly include compensation for losses suffered after the date of the writ[9] or likely to be sustained in the future.[10]

Substantial damages may and ordinarily are found, though there is no evidence as to the amount of damage, since the non-pecuniary elements of recovery are not susceptible of proof by direct evidence.[11]

Maryland: Blumhardt *v.* Rohr, 70 Md. 328.

Massachusetts: Markham *v.* Russell, 12 All. 573.

[6] *United States:* Shattuc *v.* M'Arthur, 29 Fed. 136.

Alabama: Johnson *v.* Robertson, 8 Port. 486.

California: Graybill *v.* DeYoung, 140 Cal. 523, 73 Pac. 1067.

Colorado: Republican Publishing Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut: Swift *v.* Dickerman, 31 Conn. 285.

Delaware: Todd *v.* Every Evening Pr. Co., 6 Pennew. 233, 66 Atl. 97.

Kentucky: Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Louisiana: Dufort *v.* Abadie, 23 La. Ann. 280.

Maryland: Blumhardt *v.* Rohr, 70 Md. 328.

Massachusetts: Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528.

Michigan: Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956.

New Jersey: Marsh *v.* Edge, 68 N. J. L. 661, 54 Atl. 834.

South Dakota: Bedtkey *v.* Bedtkey, 15 S. D. 310, 89 N. W. 479.

Texas: Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

Vermont: Rea *v.* Harrington, 58 Vt. 181.

It is not essential to recovery for mental suffering from a libel that the plaintiff's reputation should be injured. McArthur *v.* Sault News Printing Co., 148 Mich. 556, 112 N. W. 126, 14 Detroit Leg. N. 265.

[7] Haythorn *v.* Lawson, 3 C. & P. 196, 14 E. C. L. 523.

[8] Farbenfabriken of Elberfeld Co. *v.* Beringer, 158 Fed. 802, 86 C. C. A. 62.

[9] Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612.

[10] *Maine:* True *v.* Plumley, 36 Me. 466.

England: Gregory *v.* Williams, 1 C. & K. 568, 47 E. C. L. 568.

Contra, New York: Halstead *v.* Nelson, 24 Hun, 395 (*semble*).

[11] *Arkansas:* Taylor *v.* Gumpert (Ark.), 131 S. W. 968.

§ 444. Consequential damages.

In Georgia *v.* Kepford [12] the defendant charged the plaintiff with larceny and adultery. The plaintiff endeavored to show that, in consequence of the slander, his wife left him and began an action for divorce on the ground of inhuman treatment. It was held that the desertion of his wife and the expenses of defending the divorce suit were too remote to be considered as damages from the slander. It seems, however, that if the plaintiff had proved, as he had alleged, that the words were uttered to induce his wife to leave him, damages for this could have been recovered; and in Case *v.* Case [13] the plaintiff, who had been grossly slandered in respect of her chastity by her mother-in-law, was allowed to include in her recovery damages for alienation of her husband's affections.

Loss of business resulting from defamation may be a proper subject of recovery,[14] provided it is proved with reasonable certainty.[15] It seems that writing of the plaintiff that he "was the ringleader of the nine-hours' system," cannot be considered likely to produce any damage to the plaintiff.[16] In this case, the plaintiff alleged that, by reason of the libel, he was prevented from obtaining employment at his trade. In a Texas decision [17] one libelling a public officer in his capacity as such was held liable for damages proximately resulting from the publication; but such damages were declared not to include the loss of financial credit, the expense of borrowing money, or other injuries unconnected with his official position. In Scotland, in Leven *v.* Young,[18] an action for defamation, in consequence of which the plaintiff was removed from his office, which was one dependent on the will of his superiors, it was held that the jury must take into consideration both the nature and tenure of the office, and not give the value of an annuity certain.

Iowa: Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1.

But see Woodhouse *v.* Powles, 43 Wash. 617, 86 Pac. 1063, 8 L. R. A. (N. S.) 783.

[12] 45 Ia. 48.

[13] 45 Neb. 493, 63 N. W. 867.

[14] Smith *v.* Hubbell, 151 Mich. 59, 114 N. W. 865.

[15] Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

[16] Miller *v.* David, L. R. 9 C. P. 118.

[17] Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; *acc.*, Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

[18] 1 Murray, 350, 384.

In Butler *v.* Hoboken Printing Co.[19] the New Jersey court declared illness produced by mental suffering following the attacks not to be an element in the plaintiff's recovery.

In one or two cases, presumably on the theory that the vindication of character is a natural consequence of attacks upon it, the plaintiff has been allowed to recover reasonable counsel fees,[20] but this is not the general rule.[21]

§ 444a. Repetition by a third person.

It must be regarded as an established general principle that the repetition by others of the defendant's charge is not an element of recovery in the action against him.[22] And where, in an action by a surgeon for a slander imputing that a female servant had a bastard child by him, in consequence of which one who had engaged him as accoucheur would not employ him, and the plaintiff was otherwise injured in his business, it was held that although his damages should not be confined to the fee lost in the special instance, he could not recover for a general loss of business caused by repetition of the slander by third persons, which could not have arisen directly from the speaking of the words by the defendant.[23] But where the repetition could have been anticipated by the defendant he is responsible. So a newspaper publisher who in fact knows that the defamation will be copied in other newspapers is probably liable for the repetition; [24] and where references by third parties to the charge are not actionable, the original author is liable in damages for loss sustained through them.[25] The circulation of a letter by the recipient increases

[19] 73 N. J. L. 45, 62 Atl. 272.

[20] *Louisiana:* Guice *v.* Harvey, 14 La. 198.

Ohio: Finney *v.* Smith, 31 Ohio St. 529, 27 Am. Rep. 524.

[21] Hicks *v.* Foster, 13 Barb. (N. Y.) 663; Halstead *v.* Nelson, 24 Hun, 395; *ante*, § 233.

[22] *Iowa:* Prime *v.* Eastwood, 45 Iowa, 640.

New York: Austin *v.* Bacon, 49 Hun, 386, 3 N. Y. Supp. 587.

Contra, Maine: Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516.

[23] Dixon *v.* Smith, 5 H. & N. 450.

Acc., California: Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Massachusetts: Parker *v.* Republican Co., 181 Mass. 392, 63 N. E. 931.

[24] Whitney *v.* Moingnard, 24 Q. B. Div. 630.

[25] *New York:* Keenholts *v.* Becker, 3 Denio, 346.

Rhode Island: Rice *v.* Cottrel, 5 R. I. 340.

Vermont: Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

the liability of the author only where it is a natural consequence of the act of sending it.[26]

§ 445. Aggravation—Social and pecuniary position of the parties.

Evidence may be given of the defendant's pecuniary circumstances, and his position and influence in society. The defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury from his slanderous speech.[27] In Brown *v.* Barnes [28] it was said that the jury should be cautioned against considering it except as bearing on the injury likely to flow from slanders uttered by a man of the defendant's standing. The fact that a communication reflecting on the plaintiff's solvency was made by a banker has been held to be an element in the determina-

[26] Merchants' Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 9.

[27] *United States:* Broughton *v.* McGrew, 39 Fed. 672.

Connecticut: Barber *v.* Barber, 33 Conn. 335.

Illinois: Hintz *v.* Crauper, 138 Ill. 158, 27 N. E. 935.

Indiana: Wilson *v.* Shepler, 86 Ind. 275.

Iowa: Bailey *v.* Bailey, 94 Iowa, 598, 63 N. W. 341.

Maine: Stanwood *v.* Whitmere, 63 Me. 209.

Massachusetts: Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228.

Michigan: Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228.

Minnesota: Burch *v.* Bernard, 107 Minn. 210, 120 N. W. 33.

Missouri: Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086.

New York: Lewis *v.* Chapman, 19 Barb. 252.

Ohio: Mauk *v.* Brundage, 68 Oh. St. 89, 67 N. E. 152.

Pennsylvania: M'Almont *v.* M'Clelland, 14 S. & R. 359.

Virginia: Harman *v.* Cundiff, 82 Va. 239.

Contra, Alabama: Ware *v.* Cartledge, 24 Ala. 622.

Delaware: Morris *v.* Barker, 4 Harr. 520; Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Florida: Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

And see Palmer *v.* Haskins, 28 Barb. 90; Austin *v.* Bacon, 49 Hun, 386.

In a few states such evidence has been admitted as bearing on the question of exemplary damages only.

Maryland: Wilms *v.* White, 26 Md. 380.

Missouri: Buckley *v.* Knapp, 48 Mo. 152.

New Hampshire: Knight *v.* Foster, 39 N. H. 576.

North Carolina: Adcock *v.* Marsh, 8 Ired. 360.

Ohio: Hayner *v.* Cowden, 27 Oh. St. 297 (but see Alpin *v.* Morton, 21 Oh. St. 536, where it is said it shows the plaintiff's injury).

In Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086, one suing a husband and wife for slander by the latter was allowed to prove the financial condition of both defendants.

[28] 39 Mich. 211; *acc.*, Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403.

tion of his damages.[29] Where a libel is published in a newspaper, the circulation of the paper, and its character and standing, may be shown; but not the wealth of the defendant, its proprietor, where no exemplary damages are to be given.[30] In Storey *v.* Early [31] the court says:

"The extent of the circulation of the newspaper of defendant, and the character and standing of that newspaper for fairness, justice, and truth, might well be considered upon that question. The wealth of the publisher might be great, and his social standing high, and yet the paper might be of such character as to exert but little influence upon the public mind. On the other hand, the publisher might be insolvent, and his position in society very low, and yet the paper might be very attractive and have a very large circulation, and enjoy the confidence of the public to such a degree, for justice and truth, that statements in its columns might carry great weight."

In an action for defamation against a corporation evidence of its financial standing is inadmissible.[32] Where several individuals are joined as defendants, the financial standing of some of them may be proved.[33]

Evidence of the defendant's resources is clearly of a nature to tempt the jury into giving excessive damages; and much opposition has been shown toward the doctrine which admits it. It is urged with force that the slander receives its added force not from the defendant's wealth, but from his character, and that the latter, not the former, should be shown. In Palmer *v.* Haskins [34] Marvin, J., said:

"The question, so far as principle is concerned, hinges upon the assumption that wealth influences the rank in society of its possessor, and that the slander of a man of rank and influence is more injurious than the slander of one of less

[29] Lewis *v.* Chapman, 19 Barb. (N. Y.) 252.

[30] *Illinois:* Storey *v.* Early, 86 Ill. 461. *Nebraska:* Rosewater *v.* Hoffman, 24 Neb. 222.

[31] 86 Ill. 461, 465.

[32] *United States:* Western Union Tel. Co. *v.* Cashman, 132 Fed. 805. *Michigan:* Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361. *Virginia:* Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

[33] Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

[34] 28 Barb. 90, 92.

influence. It may be admitted that the slander of a man of high character and influence would be more destructive to the character of the party slandered than the slander of one without character and influence. Hence the character and standing in society of the defendant have long been admitted in evidence in this class of cases. But I am not satisfied that wealth is a necessary ingredient to constitute character, standing, and influence in society. It may form an element in fixing character and influence, but not necessarily. Why not limit the inquiry, then, to the question, what are the character, standing, and influence of the defendant in the society where the slander was uttered?" [35]

Since it is the influence of the defendant's wealth on the minds of the hearers that aggravates the offense, rather than the mere possession of wealth, it has been held in Maine that proof should be made of the general reputation of the defendant for wealth *in the place where the slander was uttered*, rather than the amount of property he in fact possesses.[36] But perhaps the best solution of the question is that all facts bearing on character, standing, and influence should go to the jury, subject to a charge that they must only consider them *in this bearing*. The poverty of the plaintiff cannot be shown in aggravation; [37] but his social position and standing may be shown, that the jury may properly estimate compensation for injury to them.[38]

[35] *Acc.*, Justice *v.* Kirlin, 17 Ind. 588.

[36] Stanwood *v.* Whitmore, 63 Me. 209.

[37] *Alabama:* Pool *v.* Devers, 30 Ala. 672.

Connecticut: Case *v.* Marks, 20 Conn. 248.

Iowa: Perrine *v.* Winter, 73 Ia. 645.

North Carolina: Reeves *v.* Winn, 97 N. C. 246.

Contra, Pennsylvania: M'Almont *v.* M'Clelland, 14 S. & R. 359 (*semble*).

[38] *United States:* Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53.

Illinois: Peltier *v.* Mict, 50 Ill. 511.

Indiana: Wilson *v.* Shepler, 86 Ind. 275.

Missouri: Clements *v.* Maloney, 55 Mo. 352.

Ohio: Allianee R. P. Co. *v.* Valentine, 9 Ohio C. Ct. 387.

Contra, New York: Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12.

In Gassely *v.* Humphries, 35 Ala. 617, it was laid down that in slander for imputing larceny, the fact that the plaintiff was a clergyman cannot be considered by the jury in enhancement of the damages, where there is no averment on his part in the pleadings to that effect, and no claim or proof of special damages on that ground.

The fact of plaintiff's being a married man and having children may be shown as a circumstance enhancing mental suffering, at least in the case of a charge of sexual immorality.[39]

The intellectual and moral quality of the hearer of a slander has been declared irrelevant to the determination of the injury sustained through it.[40]

In a few cases the plaintiff to enhance recovery has been allowed to prove the excellence of his reputation, although the defendant has not attacked it,[41] in others his right to do so has been denied.[42]

§ 446. Other charges by the defendant than that alleged.

There is great confusion in the authorities as to the admissibility and effect of earlier or later expressions of the defamation sued upon or of other defamations. In a number of jurisdictions even charges of other offences published at earlier or later dates are admitted to prove the character of the original transaction, and the motives of the defendant and, by so establishing express malice, to enhance damages; [43] but such wrongs are not to be in themselves substantive elements of the damages recovered. In Louisiana [44] proof of distinct defamations seems to be confined to attacks upon the plaintiff's character within the year preceding the inception of the suit. In most cases evidence of this sort has taken the form

[39] *California:* Cahill *v.* Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88.

New York: Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123; Weber *v.* Butler, 81 Hun, 244, 30 N. Y. Supp. 713.

[40] Sheffill *v.* Van Deusen, 15 Gray (Mass.), 485, 77 Am. Dec. 377.

[41] *Kentucky:* Williams *v.* Greenwade, 3 Dana, 432.

Virginia: Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455.

[42] *California:* Davis *v.* Hearst, 116 Pac. 530.

Delaware: Parke *v.* Blackiston, 3 Harr. 373.

Pennsylvania: Chubb *v.* Gsell, 34 Pa. 114.

[43] *United States:* Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201.

Alabama: Scott *v.* McKinnish, 15 Ala. 662.

Kentucky: Smith *v.* Lovelace, 1 Duv. 215.

Maine: Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516.

New Hampshire: Symonds *v.* Carter, 32 N. H. 458.

Wisconsin: Hacker *v.* Heiney, 111 Wis. 313, 319, 87 N. W. 249.

And see Rustell *v.* Macquister, 1 Campb. 49; Pearson *v.* Lemaitre, 5 Mann. & G. 700.

[44] Kendrick *v.* Kemp, 6 Mart. (N. S.) 500.

of antecedent or subsequent expressions in the same or similar language of the principal charge;[45] a few of the cases have denied to such the testimony all bearing upon the matter of damages, accordingly giving to it the effect merely of cumulative evidence of the malice which the law itself implies in the making of defamatory statements.[46] In Howell *v.* Chatham [47] evidence was rejected of an attack upon the plaintiff's character after the commencement of suit; in a New Jersey decision, the admissibility of any defamations themselves actionable was denied.[48] The New York courts for a while showed a tendency to restrict evidence of this character to charges that, as barred by the statute of limitations [49] or by a release,[50] could never be of themselves subjects of recovery, and words spoken [51] or written [52] after the inception of the action were of necessity excluded; but more recent decisions have put the State in accord with the weight of authority on the point.[53]

A Connecticut decision [54] admitted in evidence a charge itself the subject of an earlier successful action by the plain-

[45] *Alabama:* Parmer *v.* Anderson, 33 Ala. 78.

California: Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958.

Connecticut: Swift *v.* Dickerman, 31 Conn. 285.

Illinois: Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

Indiana: Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4.

Maine: Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147.

Maryland: Gambrill *v.* Schooley, 93 Md. 48, 52 Atl. 500.

Massachusetts: Markham *v.* Russell, 12 Allen, 573, 90 Am. Dec. 169.

Michigan: Leonard *v.* Pope, 27 Mich. 145.

North Dakota: Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Oregon: Upton *v.* Hume, 24 Ore. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863.

Pennsylvania: Shock *v.* McChesney, 2 Yeates, 473.

Virginia: Lincoln *v.* Chrisman, 10 Leigh, 338.

[46] *Indiana:* Meyer *v.* Bohlfing, 44 Ind. 238.

Iowa: Hinkle *v.* Davenport, 38 Iowa, 355.

[47] Cooke (Tenn.), 247; *acc.*, Defries *v.* Davis, 7 C. & P. 112.

[48] Schenck *v.* Schenck, 20 N. J. L. 208.

[49] Inman *v.* Foster, 8 Wend. 602; Titus *v.* Sumner, 44 N. Y. 266.

[50] Glanders *v.* Graff, 25 Hun (N. Y.), 553.

[51] Distin *v.* Rose, 69 N. Y. 122.

[52] Eccles *v.* Radam, 75 Hun, 535, 27 N. Y. Supp. 486.

[53] Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123; Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

[54] Swift *v.* Dickerman, 31 Conn. 285.

tiff. A Maine case [55] accepted words spoken on a qualifiedly privileged occasion; but words absolutely privileged have been twice rejected.[56] A few cases have differentiated the proof of other libellous publications than that alleged from the proof of earlier or later spoken slanders. In Mix *v.* Woodward [57] the court rejected such evidence altogether in the case of written defamation; in Fisher *v.* Patterson [58] it was admitted only to explain the intent, in itself doubtful, of the principal publication; and in Finnerty *v.* Tipper [59] only where the charges adduced in terms referred to that alleged.

§ 447. Plea of justification.

It has been held that an unsuccessful plea of justification is a good ground for increasing the damages. But the inclination of the later cases is against this idea; which, in truth, leads to an effort to punish what may be a perfectly innocent act. So, in Indiana, in slander for perjury, if the defendant plead the truth of the words in justification, and fail to prove the plea, the filing of that plea is not an aggravation; and, on the contrary, if, from the evidence, it appear that the defendant, though he cannot strictly justify, had reason to believe, from the plaintiff's conduct, that the charge was true, such fact may go to the jury in mitigation of damages.[60] And, in Tennessee, an invalid and insufficient plea of justification in an action of slander upon which no judgment could have been entered, is entitled to no weight in aggravation of damages under the plea of not guilty.[61]

The decisions upon this point are, however, not in harmony. In some jurisdictions it is held that such a plea is evidence of actual malice, and a high aggravation of the offence.[62] So, in

[55] Davis *v.* Starrett, 97 Me. 568, 58 Atl. 516.

[56] *Massachusetts:* Watson *v.* Moore, 2 Cush. 133, 141.

New York: McLaughlin *v.* Charles, 60 Hun, 239, 14 N. Y. Supp. 608.

[57] 12 Conn. 262.

[58] 14 Ohio, 418; *acc.*, Saunders *v.* Baxter, 6 Heisk. (Tenn.) 369.

[59] 2 Camp. 72.

[60] *Indiana:* Sanders *v.* Johnson, 6 Blackf. 50; Byrket *v.* Monohon, 7 Blackf. 83; Shortly *v.* Miller, Smith, 395.

West Virginia: Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

England: Chalmers *v.* Shackell, 6 C. & P. 475.

[61] Braden *v.* Walker, 8 Humphreys, 34.

[62] *Alabama:* Pool *v.* Devers, 30 Ala. 672.

Vermont, it is competent for the jury, on the question of damages, to take into consideration the fact that the defendant, in his pleadings, has repeated and attempted to justify his statements.[63] On the other hand, in other jurisdictions, such a plea, interposed in good faith, is no ground for increasing the damages.[64] As just stated, we think the last rule is the true one, and that the plea should not, as matter of law, carry with it any effect of aggravation. The necessity of such a consequence may prevent an honest defence. As was said, in Rayner *v.* Kinney,[65] the motive with which the justification is pleaded, should be "for the consideration of the jury. If they find that it was done with the intention to injure the plaintiff, they may rightly consider it an aggravation of the damages; but where no wrongful intention is found, there is no just ground for the punishment of the defendant." In New York, the severer rule formerly obtained,[66] although, before the Code of Procedure, it had perhaps been modified by a limitation of the increase of the damages to the extent of the injury sustained by the repetition.[67] But it would seem to have been wholly superseded by that act, which permits the defendant, in his answer, to allege both the truth of the matter charged as defamatory, and any mitigating circumstances, and whether he

Colorado: Downing *v.* Brown, 3 Colo. 571.

Georgia: Henderson *v.* Fox, 83 Ga. 233.

Louisiana: Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826.

Maine: Sawyer *v.* Hopkins, 22 Me. 268.

Maryland: Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567.

Massachusetts: Jackson *v.* Stetson, 15 Mass. 48; Clark *v.* Binney, 2 Pick. 113, 121.

Mississippi: Doss *v.* Jones, 5 How. 158.

Pennsylvania: Gorman *v.* Sutton, 32 Pa. 247.

South Carolina: Burckhalter *v.* Coward, 16 S. C. 435.

Tennessee: Wilson *v.* Nations, 5 Yerg. 211.

England: Simpson *v.* Robinson, 12 Q. B. 511.

[63] Cavanaugh *v.* Austin, 42 Vt. 576.

[64] *Connecticut:* Ward *v.* Dick, 47 Conn. 300.

Illinois: Cummerford *v.* McAvoy, 15 Ill. 311; Sloan *v.* Petrie, 15 Ill. 425; Thomas *v.* Dunaway, 30 Ill. 373; Corbley *v.* Wilson, 71 Ill. 209.

Indiana: Murphy *v.* Stout, 1 Ind. 372.

New Hampshire: Pallet *v.* Sargent, 36 N. H. 496.

Ohio: Rayner *v.* Kinney, 14 Oh. St. 283, overruling the dictum *contra* in Dewit *v.* Greenfield, 5 Oh. 225.

Canada: Corridan *v.* Wilkinson, 20 Ont. App. 184.

[65] 14 Oh. St. 283.

[66] Fero *v.* Ruscoe, 4 N. Y. 162.

[67] Fulkerson *v.* George, 3 Abb. Pr. 75.

prove the justification or not, to give in evidence the mitigating circumstances.[68] And it is now held by the New York Court of Appeals, that where the defendant, in an action of libel or slander, pleads under this section, facts both in justification and mitigation, the allegations in justification, though unproved, are no longer evidence of malice to be considered by the jury, or taken as enhancing the plaintiff's damages.[69] In every jurisdiction, however, the *malicious* filing of a plea in justification may be considered in aggravation of damages, since it furnishes a ground for exemplary damages.[70] So, too, the filing of a plea in justification merely to uphold a newspaper policy of insisting upon the truth of every statement appearing in the defendant's columns.[71] That an objectionable pleading was withdrawn was held in Illinois [72] not to prevent its being used to enhance the plaintiff's recovery; but the opposite result was reached in California.[73] In Lamb *v.* West,[74] where the defendant's attorney conducted the case with obvious malice toward the plaintiff, the latter was held entitled to punitive damages.

§ 448. Mitigation.

Since the damages for defamation are in general non-pecuniary, evidence may be given in mitigation of compensatory damages as well as of exemplary damages. As in other cases, however, nothing should be received in mitigation of compen-

[68] N. Y. Co. Civ. Proc., § 535; Bush *v.* Prosser, 11 N. Y. 347.

[69] Klinck *v.* Colby, 46 N. Y. 427; Decker *v.* Gaylord, 35 Hun, 584. The remarks, therefore, of Mr. Justice E. D. Smith, to the contrary, in delivering the opinion of the Supreme Court of New York, in Bennett *v.* Matthews, 64 Barb. 410, are at variance with the settled law.

[70] *California:* Pink *v.* Catanich, 51 Cal. 420; Dauphiny *v.* Buhne, 153 Cal. 757, 96 Pac. 880; Davis *v.* Hearst, 116 Pac. 530, and cases cited.

Illinois: Spencer *v.* McMasters, 16 Ill. 405.

Missouri: Browning *v.* Powers, 38 S. W. 943, 946.

New York: Marx *v.* Press Pub. Co., 134 N. Y. 561, 31 N. E. 918.

Oregon: Shartle *v.* Hutchinson, 3 Ore. 337.

Rhode Island: Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Utah: Lowe *v.* Herald Co., 6 Utah, 175.

[71] Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384, 393.

[72] Beasley *v.* Meigs, 16 Ill. 139.

[73] Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799.

[74] 15 N. S. W. L. Rep. 120; *acc.*, Struthers *v.* Peacock, 11 Phila. (Pa.) 287.

satory damages unless it tends to show what those damages actually were. When actual damages are once ascertained they cannot be mitigated; though they are to be determined in view of all mitigating circumstances.[75] The case of exemplary damages is of course different; and there any circumstance which has a bearing on the defendant's malice may be shown.

Thus where compensatory damages only are to be given, defendant cannot, to mitigate damages, show that he is poor.[76] Nor may he show that the plaintiff has already brought suit for libel against another defendant who published an identical statement.[77] Nor should the good faith of the defendant be shown to affect compensatory damages,[78] though on this point the authorities are in conflict.[79] But this conflict may be in great part explained by the fact that exemplary damages were recoverable (though this fact is not always brought out), and such evidence is clearly admissible in mitigation of exemplary damages. So, where it appears that the defendant was drunk when he uttered the words, this may go in mitigation of damages as tending to rebut malice.[80] But where it is proved that he repeated the charge both when drunk and sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.[81] The insanity of the defendant may be shown.[82] It has apparently been allowed as a complete defence,[83] but that is not to be approved in a civil suit.

§ 448a. Disproof of actual malice.

Damages may be mitigated by disproof of actual malice.[84]

[75] Keller *v.* American B. P. Co., 140 App. Div. 311, 125 N. Y. Supp. 212.

[76] Harter *v.* Whitebread, 38 Pa. Super. Ct. 10.

[77] *United States:* Printing Assoc. *v.* Smith, 55 Fed. 240, 5 C. C. A. 91.

New York: Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501; Palmer *v.* New York News Pub. Co., 31 App. Div. 210, 52 N. Y. Supp. 539.

[78] Schattler *v.* Daily Herald Co., 162 Mich. 115, 127 N. W. 42, 17 Det. L. N. 481.

[79] See the cases cited in the following sections.

[80] *Indiana:* Gates *v.* Meredith, 7 Ind. 440.

England: Wakelin *v.* Morris, 2 F. & F. 26.

[81] Howell *v.* Howell, 10 Ired. (N. C.) 84.

[82] Brown *v.* Brooks, 3 Ind. 518; Yeates *v.* Reed, 4 Blackf. 463.

[83] Bryant *v.* Jackson, 6 Humph. (Tenn.) 199.

[84] *United States:* Erber *v.* Dun, 12

The damages so mitigated are regularly, and in some jurisdictions solely,[85] punitive; but there are cases holding the defendant's attitude of mind relevant upon the plaintiff's mental suffering and, accordingly, upon his actual damages.[86] In an action for libel, it is proper to admit evidence of what was said by the defendant in directing the printing, in order to disprove actual malice in the publication, and to influence the question of damages. The terms and conditions on which the defendant requested the printing and publication to be done, and on which the witness agreed to do it, are admissible in evidence as pertinent and material in respect to the *motives* of the defendant in procuring the publication complained of.[87]

§ 448b. Imperfect privilege.

That the charges were made in good faith to a person interested in receiving the information may be shown in mitiga-

Fed. 526, 4 McCrary, 160; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

Arkansas: Patton *v.* Cruce, 72 Ark. 421, 81 S. W. 380, 65 L. R. A. 937, 105 Am. St. Rep. 46.

California: Lick *v.* Owen, 47 Cal. 252.

Delaware: Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337; Todd *v.* Every Evening Printing Co., 6 Pennew. 233, 66 Atl. 97.

Iowa: Fountain *v.* West, 23 Iowa, 9, 92 Am. Dec. 405.

Louisiana: Germann *v.* Crescioni, 105 La. 496, 29 So. 968; Levert *v.* Daily States Pub. Co., 123 La. 594, 49 So. 206.

Michigan: Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504.

Minnesota: Quinn *v.* Scott, 22 Minn. 456.

Missouri: Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981.

Nevada: Thompson *v.* Powning, 15 Nev. 195.

New York: Hawk *v.* American News Co., 33 N. Y. Supp. 848, 24 N. Y. Civ. Proc. 255; Collis *v.* Press. Pub. Co., 68 App. Div. 38, 74 N. Y. Supp. 78.

Ohio: Henn *v.* Horn, 56 Ohio St. 442, 448, 47 N. E. 248.

Pennsylvania: Updegrove *v.* Zimmerman, 13 Pa. 619.

Wisconsin: Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000.

[85] *United States:* Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475; Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 397; Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309.

Arkansas: Murray *v.* Galbraith, 95 Ark. 199, 128 S. W. 1047.

Kentucky: Nicholson *v.* Rust, 21 Ky. L. R. 645, 52 S. W. 934.

New Jersey: Knowlden *v.* Guardian Printing, etc., Co., 69 N. J. L. 670, 55 Atl. 287; Neafie *v.* Hoboken P. & P. Co., 75 N. J. L. 564, 68 Atl. 146.

New York: Robinson *v.* Evening Post Pub. Co., 39 App. Div. 525, 57 N. Y. Supp. 303.

Wisconsin: Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99.

[86] *Massachusetts:* Markham *v.* Russell, 12 Allen, 573, 90 Am. Dec. 169.

Michigan: Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447; Scripps *v.* Reilly, 38 Mich. 10.

[87] Taylor *v.* Church, 8 N. Y. 452.

tion, though the circumstances were not such as to make the communication privileged in the technical sense. Thus, the fact that charges against an officer of state or candidate for office were made from a genuine desire to enlighten the public will be received in mitigation of damages.[88] A defendant has been allowed to prove that the charge of unchastity was made to a young man who seemed to be courting the plaintiff.[89] The circumstance that a reflection on the plaintiff's commercial credit was telegraphed in confidence by a company engaged in supplying information on the topic goes in mitigation.[90] One whose defamation was uttered in order to give warning against an undesirable neighbor is entitled to some leniency from the jury;[91] and in assessing damages the fact that the defendant did not seek the interview may properly be considered.[92]

§ 448c. Belief in truth of charge.

Matters which induced a belief of the truth of the charge in the defendant may be shown to disprove malice;[93] for example, that the plaintiff was seen in a suspicious situation,[94] or that his conduct was equivocal.[95] Where the defendant accused the plaintiff of unchastity, evidence is admissible of an increase in the plaintiff's size resembling pregnancy, which in fact was from another cause.[96] In an action for a libel the receipt by the de-

[88] *Illinois:* Rearick *v.* Wilcox, 81 Ill. 77.

Maryland: Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Michigan: Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

[89] Blocker *v.* Schoff, 83 Iowa, 265, 48 N. W. 1079.

[90] Jeffras *v.* McKillop, 2 Hun, 351.

[91] Beggarly *v.* Craft, 31 Ga. 309, 76 Am. Dec. 687.

[92] Davis *v.* Sladden, 17 Ore. 259, 21 Pac. 140.

[93] *Illinois:* Moore *v.* Mauk, 3 Ill. App. 114.

Kansas: Miles *v.* Harrington, 8 Kan. 425.

Kentucky: Evening Post Co. *v.* Rhea, 31 S. W. 273, 26 Ky. L. Rep. 375.

Pennsylvania: Petrie *v.* Rose, 5 Watts & S. 364.

Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344, *contra*, is perhaps best to be explained on the theory that punitive damages were on principles apart from this topic disallowed.

[94] Haywood *v.* Foster, 16 Ohio, 88.

[95] *New York:* Spooner *v.* Keeler, 51 N. Y. 527.

Ohio: Wilson *v.* Apple, 3 Ohio, 270; Reynolds *v.* Tucker, 6 Oh. St. 516.

Pennsylvania: Minesinger *v.* Kerr, 9 Pa. 312.

Shepard *v.* Merrill, 13 Johns. 475, reached an opposite result partly, it would seem, on a point of pleading.

[96] Doe *v.* Roe, 32 Hun, 628.

fendant of forged letters containing statements upon which the charge was founded may be shown in mitigation;[97] and so, too, evidence has been admitted that the charge was founded on information obtained from the journal of Congress[98] or from the police[99] or from newspapers.[100] And generally if the defendant can establish his *bona fide* belief in the truth of the charge this may be shown in mitigation;[101] though in some jurisdictions it cannot be shown in mitigation of actual damages, but only of exemplary damages.[102]

§ 448d. Repetition of earlier charge made by another.

In actions of slander and libel, it has been much discussed how far the fact of the slander or libel complained of being a mere repetition or republication can be set up, either in justification or mitigation.[103] In some early actions of slander proof that the words were first spoken by another person, whom the defendant in his statement named as author, barred the plaintiff's action;[104] and though this is not now law, later decisions almost uniformly admit such evidence in mitigation of damages, alike in actions of libel and of slander.[105] And it

[97] *Illinois:* Storey *v.* Early, 86 Ill. 461.

Kentucky: FosterMilburn Co. *v.* Chinn, 137 Ky. 834, 120 S. W. 364.

[98] Romayne *v.* Duane, 3 Wash. C. C. 246, Fed. Cas. No. 12,028.

[99] Evening Post Co. *v.* Hunter, 18 Ky. L. Rep. 726, 38 S. W. 487.

[100] *United States:* Printing Assoc. *v.* Smith, 55 Fed. 240, 5 C. C. A. 91.

Michigan: Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507.

Minnesota: Hewitt *v.* Pioneer-Press Co., 23 Minn. 178, 23 Am. Rep. 680.

New York: Gray *v.* Brooklyn Union Pub. Co., 35 App. Div. 286, 52 N. Y. Supp. 35.

[101] Republican Pub. Co. *v.* Mosman, 15 Colo. 409, 24 Pac. 1055; Rocky Mountain N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 Pac. 956, 24 L. R. A. (N. S.) 891.

[102] Garrison *v.* Robinson (N. J. L.), 79 Atl. 278.

[103] Bennett *v.* Bennett, 6 C. & P. 588, and cases cited.

[104] *Maine:* Haynes *v.* Leland, 29 Me. 233.

Pennsylvania: Binns *v.* McCorkle, 2 Browne, 79; Hersh *v.* Ringwalt, 3 Yeates, 508, 2 Am. Dec. 392.

South Carolina: Miller *v.* Kerr, 2 McCord, 285, 13 Am. Dec. 722.

Tennessee: Larkins *v.* Tarter, 3 Sneed, 681.

England: Davis *v.* Lewis, 7 T. R. 17.

[105] *Indiana:* Kelley *v.* Dillon, 5 Ind. 426.

Iowa: Beardsley *v.* Bridgman, 17 Iowa, 290.

Kentucky: Williams *v.* Greenwade, 3 Dana, 432.

Missouri: Baldwin *v.* Boulware, 79 Mo. App. 5.

Pennsylvania: Follett *v.* Jewett, 1 Am. L. Reg. 600, 11 N. Y. Leg. Obs. 193; Stepp *v.* Croft, 18 Pa. Super. Ct. 101; Kennedy *v.* Gregory, 1 Bin. 85.

is now well established that a defendant, in order to show the absence of bad motive for the publication, may prove that his charge was repeated from some reliable source, whether or not the authority was named.[106] Some cases have declared the existence of common rumor of the truth of the charge relevant, upon the question of malice, but other cases have denied its admissibility.[107]

In order to afford evidence of the defendant's motives the defamation of others must have been known to him; [108] and even where the authority for the charge is mentioned, further facts, such as lack of belief in its truth, may show actual malice.[109] In Hayes *v.* Tibbits [110] the fact that a libel was published at the request and on the information of a third person was held not to be a mitigating circumstance.

§ 449. Provocation.

In Louisiana verdicts for the defendant have been allowed to stand where the facts showed a war of slanderous words between the parties.[111] In other jurisdictions it is agreed that

Rhode Island: Rice *v.* Cottrel, 5 R. I. 340.

South Carolina: Easterwood *v.* Quin, 2 Brev. 64, 3 Am. Dec. 700.

[106] *United States:* McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244.

Connecticut: Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69 (see Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156).

Iowa: Morse *v.* Times Republican Printing Co., 124 Iowa, 707, 100 N. W. 867.

Kentucky: Evans *v.* Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74.

Missouri: Hawkins *v.* Globe Printing Co., 10 Mo. App. 174.

Oregon: Upton *v.* Hume, 24 Ore. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863.

Pennsylvania: Regensperger *v.* Kiefer, 4 Pa. Cas. 541, 7 Atl. 724; Morris *v.* Duane, 1 Bin. 90.

Rhode Island: Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina: Galloway *v.* Courtney, 10 Rich. 414.

England: Creevy *v.* Carr, 7 C. & P. 64.

Contra, Missouri: Moberly *v.* Preston, 8 Mo. 462.

Pennsylvania: Good *v.* Grit Pub. Co., 36 Pa. Super. Ct. 238.

[107] Post, § 451.

[108] *Michigan:* Wolff *v.* Smith, 112 Mich. 359, 70 N. W. 1010.

Minnesota: Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 39 N. W. 462.

New York: Hatfield *v.* Lasher, 81 N. Y. 246; Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501; Witcher *v.* Jones, 17 N. Y. Supp. 491; Carpenter *v.* N. Y. Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. Supp. 263.

[109] Jones *v.* Chapman, 5 Blackf. (Ind.) 88.

[110] 2 Abb. Pr. (N. Y.), N. S. 97.

[111] Fulda *v.* Caldwell, 9 La. Ann. 358; Goldberg *v.* Dobbertine, 46 La. Ann. 1303, 1308, 16 So. 192, 28 L. R. A. 721.

the defendant in actions of slander may show in mitigation the plaintiff's speaking or writing of irritating words or other provocation.[112] The defendant's passion not founded on the plaintiff's acts or words will not reduce damages.[113] There must, accordingly, be some connection between the provocation and the defamation.[114] In some cases it has been said that the test in slander is the same as in assault and that the plaintiff's wrongdoing is inadmissible if so remote from the defendant's as to afford an opportunity for hot blood to cool.[115] In other decisions, both in libel and slander, evidence of the plaintiff's charges has been declared inadmissible unless a part of the controversy or transaction which included the defendant's publication.[116] Testimony will not be received to show the plain-

[112] *Alabama:* Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Arkansas: Patton *v.* Cruce, 72 Ark. 421, 81 S. W. 380, 105 Am. St. Rep. 46, 65 L. R. A. 937.

Georgia: Pugh *v.* McCarty, 40 Ga. 444.

Illinois: Freeman *v.* Tinsley, 50 Ill. 497; Thomas *v.* Fischer, 71 Ill. 576.

Indiana: Brown *v.* Brooks, 3 Ind. 518; Mousler *v.* Harding, 33 Ind. 176.

Iowa: McClintock *v.* Crick, 4 Iowa, 453; Emerson *v.* Miller, 115 Iowa, 315, 88 N. W. 803.

Kentucky: Craig *v.* Catlet, 5 Dana, 323; Duncan *v.* Brown, 15 B. Mon. 186.

Maryland: Botelar *v.* Bell, 1 Md. 173; Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583; Davis *v.* Griffith, 4 Gill & J. 342.

Michigan: Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687; Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447.

Minnesota: Warner *v.* Lockerby, 31 Minn. 421.

Mississippi: Powers *v.* Presgroves, 38 Miss. 227.

Missouri: Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

New York: Xavier *v.* Oliver, 80 App. Div. 292, 80 N. Y. Supp. 225; Else *v.* Ferris, Anth. N. P. 36; Maynard *v.* Beardsley, 7 Wend. 560.

Oregon: Shartle *v.* Hutchinson, 3 Ore. 337.

Tennessee: Haws *v.* Stanford, 1 Tenn. Cas. 80.

Wisconsin: Rogers *v.* Henry, 32 Wis. 327; Massuere *v.* Dickens, 70 Wis. 83; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004.

England: Watts *v.* Fraser, 7 C. & P. 369.

Canada: Downey *v.* Stirton, 1 Ont. 186; Stirton *v.* Gummer, 31 Ont. 227.

[113] *Illinois:* Flagg *v.* Roberts, 67 Ill. 485; Miller *v.* Johnson, 79 Ill. 58.

Louisiana: Bonnin *v.* Elliott, 19 La. Ann. 322.

Maryland: Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583.

New York: Gould *v.* Weed, 12 Wend. 12.

[114] Battell *v.* Wallace, 30 Fed. 229.

[115] *Massachusetts:* Sheffill *v.* Van Deusen, 15 Gray, 485, 77 Am. Dec. 377; Child *v.* Homer, 13 Pick. 503.

Minnesota: Quinby *v.* Minn. Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693.

[116] *Indiana:* Swann *v.* Rary, 3 Blackf. 298.

New York: Lister *v.* Wright, 2 Hill, 320.

tiff's habit of defaming the defendant;[117] nor to prove general hostile relations between the parties,[118] even though the neighborhood knew of them.[119] And the publication of a slander by way of deliberate reprisal has been regarded as evidence of malice in fact.[120]

It was held in North Carolina that mental distress of the defendant at the time he uttered the slander, caused by his belief in the truth of it, was admissible in mitigation.[121] But the defendant cannot prove in mitigation of damages, irritating language addressed to him by the father of the plaintiff immediately previous to the uttering of the slanderous words to another person.[122]

§ 450. Disproof of damage.

Another class of facts is received in mitigation as proving that the amount of damage caused to the plaintiff by the defamation was less than would at first seem to be the case.[123] Since the principal element of damage is injury to the plaintiff's character, it is pertinent to show that this character was not at all or very little injured in the minds of the hearers. This may be done in one of two ways: by showing that the words were not believed, or by showing that the plaintiff's character was so bad as not to be injured. The latter method is not encouraged by the courts, because in adopting it the defendant is obliged to defame himself. Thus in Massachusetts it was held that the defendant could not show that he was in the habit of talking

Pennsylvania: Steever *v.* Beehler, 1 Miles, 146.

Virginia: Bourland *v.* Eidson, 8 Gratt. 27.

England: May *v.* Brown, 3 B. & C. 113; Tarpley *v.* Blabey, 2 Bing. N. C. 437.

[117] *Michigan:* Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59.

North Carolina: Goodbread *v.* Ledbetter, 1 Dev. & Bat. L. 12.

England: Wakley *v.* Johnson, R. & M. 422, 27 Rev. Rep. 767, 21 E. C. L. 787.

[118] Andrews *v.* Bartholomew, 2 Met. (Mass.) 509.

In Craig *v.* Catlet, 5 Dana, 323, it was pointed out that if evidence of enmity between the parties were admissible, its normal effect would seem to be to prove rather than to disprove express malice.

[119] Swann *v.* Rary, 3 Blackf. (Ind.) 298.

[120] Gray *v.* Elzroth, 10 Ind. App. 587.

[121] McDougald *v.* Coward, 95 N. C. 368.

[122] Underhill *v.* Taylor, 2 Barb. (N. Y.) 348.

[123] Morgan *v.* Lexington Herald Co., 138 Ky. 637, 128 S. W. 1064.

too much about persons and things, so that what he said was not regarded in the community as worthy of notice.[124] Yet the evidence would bear directly on the degree of the plaintiff's injury. The defendant may prove, in mitigation of damages, a declaration of the plaintiff that he was not injured by the words complained of. But evidence that the witnesses who heard the words uttered did not believe them, is not admissible.[125] The fact that a libel will not be believed has been held in Massachusetts,[126] where exemplary damages are not allowed, not to deprive the plaintiff of his right to substantial damages.

§ 451. Bad character and reputation of plaintiff.

The general bad character and reputation of the plaintiff at the time of the alleged slander is admissible in mitigation of damages, not merely with a view to disprove malice, but upon the broader ground that a person of already disparaged reputation is not entitled to the same measure of damages as one with an unblemished fame. The evidence is admitted to show the value of what is alleged to be injured, and is, therefore, not to be restricted to the particular traits of character involved in the slanderous words.[127] So a charge to the jury

[124] Howe *v.* Perry, 15 Pick. 506; Hastings *v.* Stetson, 130 Mass. 76.

Acc. Young *v.* Slemons, Wright (Ohio), 124.

[125] Richardson *v.* Barker, 7 Ind. 567.

[126] Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

[127] *United States:* Whitney *v.* Janesville Gazette, 5 Biss. 330; Wright *v.* Schroeder, 2 Curt. 548.

Alabama: Commons *v.* Walters, 1 Port. 323.

California: Edwards *v.* San Jose Printing Assoc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Indiana: McCabe *v.* Platter, 6 Blackf. 405.

Iowa: Fletcher *v.* Burroughs, 10 Ia. 557; Hanners *v.* McClelland, 74 Ia. 318.

Kansas: Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Maine: Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

Massachusetts: Larned *v.* Buffinton, 3 Mass. 546.

Michigan: Proctor *v.* Houghtaling, 37 Mich. 41; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232.

Minnesota: Warner *v.* Lockerby, 31 Minn. 421.

New York: Calkins *v.* Colburn, 10 N. Y. 778; Wuensch *v.* Morning Journal Assoc., 4 App. Div. 110, 38 N. Y. Supp. 665; Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. Supp. 570; Paddock *v.* Salisbury, 2 Cow. 811; Hamer *v.* McFarlin, 4 Denio, 509; Stiles *v.* Comstock, 9 How. Pr. 48; King *v.* Root, 4 Wend. 113, 21 Am. Dec. 102.

North Carolina: Goodbread *v.* Ledbetter, 1 Dev. & Bat. L. 12; Vick *v.*

that if the plaintiff by her own dissolute conduct had so destroyed her character as to receive no injury from the words they should give nominal damages is good.[128] But bad character of the plaintiff after he is defamed by the defendant will of course not be admissible in mitigation.[129] The bad character of the plaintiff in the particular trait involved in the defamation may be shown.[130]

Whitfield, 2 Hayw. 222; Sowers *v.* Sowers, 87 N. C. 303.

Ohio: Dewit *v.* Greenfield, 5 Oh. 225; Fisher *v.* Patterson, 14 Oh. 418; Duval *v.* Davey, 32 Oh. St. 604.

Pennsylvania: Conroe *v.* Conroe, 47 Pa. 198; Moyer *v.* Moyer, 49 Pa. 210 (overruling Steinman *v.* McWilliams, 6 Pa. 170, on this point); Drown *v.* Allen, 91 Pa. 393; Fitzgerald *v.* Stewart, 53 Pa. 343; Henry *v.* Norwood, 4 Watts, 347.

Rhode Island: Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina: Sawyer *v.* Eifert, 2 N. & McC. 511.

Wisconsin: B. *v.* I., 22 Wis. 372; Maxwell *v.* Kennedy, 50 Wis. 645; Campbell *v.* Campbell, 54 Wis. 90.

England: Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wkly. Rep. 451.

Ireland: Bell *v.* Parke, 11 Ir. C. L. Rep. 413.

Contra, Tennessee: Lambert *v.* Pharis, 3 Head, 622; Bell *v.* Farnsworth, 11 Humph. 608.

Vermont: Smith *v.* Shumway, 2 Tyler, 74.

Virginia: Dillard *v.* Collins, 25 Gratt. 343.

Canada: Williston *v.* Smith, 3 Kerr, 443.

And see *New York:* Foot *v.* Tracy, 1 Johns. 45.

[128] Flint *v.* Clark, 13 Conn. 361.

[129] *Alabama:* Scott *v.* McKinnish, 15 Ala. 662.

New York: Douglass *v.* Tousey, 2 Wend. 352.

[130] *Alabama:* Pope *v.* Welsh, 18 Ala. 631; Fuller *v.* Dean, 31 Ala. 654; Waters *v.* Jones, 3 Port. 442.

Connecticut: Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156; Swift *v.* Dickerman, 31 Conn. 285; Brunson *v.* Lynde, 1 Root, 354; Seymour *v.* Merrills, 1 Root, 459.

District of Columbia: Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch, C. C. 324.

Illinois: Young *v.* Bennett, 5 Ill. 43; Sheahan *v.* Collins, 20 Ill. 325; Adams *v.* Smith, 58 Ill. 417.

Indiana: Woods *v.* Anderson, 5 Blackf. 598; Burke *v.* Miller, 6 Blackf. 155.

Iowa: Armstrong *v.* Pierson, 8 Ia. 29; Fletcher *v.* Burrows, 10 Ia. 557.

Kentucky: Eastland *v.* Caldwell, 2 Bibb, 21.

Maine: Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

Maryland: Shilling *v.* Carson, 27 Md. 175.

Massachusetts: Clark *v.* Brown, 116 Mass. 504; Peterson *v.* Morgan, 116 Mass. 350; Mahoney *v.* Belford, 132 Mass. 393; Parkhurst *v.* Ketchum, 6 Allen, 406, 83 Am. Dec. 639; Leonard *v.* Allen, 11 Cush. 241; Stone *v.* Varney, 7 Met. 86; Bodwell *v.* Swan, 3 Pick. 376.

Minnesota: Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

Missouri: Anthony *v.* Stephens, 1 Mo. 254.

New Hampshire: Lamos *v.* Snell, 6 N. H. 413.

New Jersey: Sayre *v.* Sayre, 25 N. J. L. 235; Pier *v.* Speer, 73 N. J. L. 633, 64 Atl. 161.

There is a conflict of opinion upon the question whether a general rumor of the truth of the fact charged by the defendant is admissible in mitigation of damages. The weight of authority favors the admission of the evidence,[131] but some courts exclude it.[132] The objection to its admission is that

Pennsylvania: Good *v.* Grit Pub. Co., 36 Pa. Super. Ct. 238.

Texas: Schulz *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580.

Vermont: Bowen *v.* Hall, 20 Vt. 232; Bridgman *v.* Hopkins, 34 Vt. 532.

Virginia: Dillard *v.* Collins, 25 Gratt. 343; M'Nutt *v.* Young, 8 Leigh, 542.

Wisconsin: B. *v.* I., 22 Wis. 372; Campbell *v.* Campbell, 54 Wis. 90; Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. 911; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

England: Anon. *v.* Moor, 1 M. & S. 284.

Contra, New York: Root *v.* King, 7 Cow. 613; Van Benschoten *v.* Yaple, 13 How. Pr. 97.

England: Jones *v.* Stevenson, 11 Price, 235.

Ireland: Bell *v.* Park, 11 Ir. C. L. Rep. 413.

[131] *United States:* Broughton *v.* McGrew, 39 Fed. 672.

Alabama: Fuller *v.* Dean, 31 Ala. 654.

Colorado: Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut: Case *v.* Marks, 20 Conn. 248 (*semble*).

Delaware: Morris *v.* Barker, 4 Harr. 520; Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Florida: Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Indiana: Brown *v.* Brooks, 3 Ind. 518; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551.

Iowa: Hinkle *v.* Davenport, 38 Ia. 355; Barr *v.* Hack, 46 Ia. 308.

Kentucky: Calloway *v.* Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 406; McIntyre *v.* Bransford, 13 Ky. L. Rep. 454, 17 S. W. 359; Morgan *v.* Lexington Herald Co., 138 Ky. 637, 128 S. W. 1064.

Michigan: Farr *v.* Rasco, 9 Mich. 353, 80 Am. Dec. 88; Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397.

New Hampshire: Wetherbee *v.* Marsh, 20 N. H. 561; Wier *v.* Allen, 51 N. H. 177 (see Dame *v.* Kenney, 25 N. H. 318).

New Jersey: Hoboken Printing, etc., Co. *v.* Kahn, 58 N. J. L. 359, 33 Atl. 382, 1060, 55 Am. St. Rep. 609; Stuart *v.* News Pub. Co., 67 N. J. L. 317, 51 Atl. 709.

New York: Springstein *v.* Field, Anth. N. P. 252; Matson *v.* Buck, 5 Cow. 499; Skinner *v.* Powers, 1 Wend. 451 (see Inman *v.* Foster, 8 Wend. 602).

North Carolina: McCurry *v.* McCurry, 82 N. C. 296.

Ohio: Wilson *v.* Kenyon, Wright, 651; Hilbrant *v.* Simmons, 18 Ohio C. Ct. 123 (see Fisher *v.* Patterson, 14 Ohio, 418; McCoy *v.* Crawford, Tapp. 238).

Pennsylvania: Pease *v.* Shippen, 80 Pa. 513, 21 Am. Rep. 116 (see Fitzgerald *v.* Stewart, 53 Pa. 343).

Tennessee: Hancock *v.* Stephens, 11 Humph. 507.

Texas: Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037; Schultz *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580.

Canada: Edgar *v.* Newall, 24 Up. Can. Q. B. 215.

The court in Nelson *v.* Wallace, 48 Mo. App. 193, admitted the existence of general rumor, as bearing upon express malice, to reduce exemplary damages, but denied its relevancy upon the point of actual damages.

[132] *California:* Chamberlin *v.* Vance, 51 Cal. 75; Preston *v.* Frey, 91 Cal. 107,

if the truth is not pleaded in justification the plaintiff is not prepared to disprove the fact. Yet, on the other hand, if a general rumor already prevailed of the same tenor as the defendant's words, the latter would clearly not damage the plaintiff to so great a degree as if no such rumor prevailed. So far as any principle of the law of damages is concerned, therefore, the evidence should be received. If rejected, it should be upon the ground that the line of defense is not open under the pleadings.

By the great weight of authority, no evidence can be received of particular acts not charged in the defendant's words, nor of rumors of them, even though the charge was of a general bad character which the particular acts would tend to prove; [133] but in a few cases the defendant has been allowed to prove particular forms of wrongdoing of the same char-

27 Pac. 533; Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Davis *v.* Hearst, 116 Pac. 530.

Illinois: Young *v.* Bennett, 5 Ill. 43; Lehning *v.* Hewett, 45 Ill. 23; Strader *v.* Snyder, 67 Ill. 404.

Iowa: Marker *v.* Dunn, 68 Iowa, 720, 28 N. W. 38.

Massachusetts: Peterson *v.* Morgan, 116 Mass. 350; Mahoney *v.* Belford, 132 Mass. 393.

Missouri: Anthony *v.* Stephens, 1 Mo. 254.

Utah: Fenstermaker *v.* Tribune Pub. Co., 13 Utah, 532, 43 Pac. 112.

England: Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wk'ly Rep. 451; Saunders *v.* Mills, 6 Bing. 213; Waithman *v.* Weaver, 11 Price, 257, *n.* (See Earl of Leicester *v.* Walter, 2 Camp. 251; Mills *v.* Spencer, 1 Holt, 533.)

Ireland: Bell *v.* Park, 11 Ir. C. L. Rep. 413.

[133] *United States:* Sun Printing & Pub. Assoc. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163; Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

Alabama: Bradley *v.* Gibson, 9 Ala. 406.

Connecticut: Seymour *v.* Merrills, 1 Root, 459.

Illinois: Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

Indiana: Hallowell *v.* Guntle, 82 Ind. 554; Burke *v.* Miller, 6 Blackf. 155.

Iowa: Hanners *v.* McClelland, 74 Ia. 318.

Massachusetts: McLaughlin *v.* Cowley, 131 Mass. 70; Parkhurst *v.* Ketchum, 6 Allen, 406, 83 Am. Dec. 639.

Michigan: Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361.

New Hampshire: Lamos *v.* Snell, 6 N. H. 413.

New Jersey: Pier *v.* Speer, 73 N. J. L. 633, 64 Atl. 161.

New York: Willover *v.* Hill, 72 N. Y. 36; Wuensch *v.* Morning Journal Association, 4 App. Div. 110, 38 N. Y. Supp. 605; Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. Supp. 570.

North Carolina: Vick *v.* Whitfield, 2 Hayw. 222.

Ohio: Dewit *v.* Greenfield, 5 Oh. 225; Duval *v.* Davey, 32 Oh. St. 604.

acter as that charged,[134] or even entirely independent transgressions; [135] and where the defendant's defamation involved two charges, proof of the truth of one has been allowed to diminish the amount of damages for the other.[136] These decisions are difficult to sustain on principle; for, as was pointed out in the case of Sun Printing & Publishing Co. *v.* Schenck,[137] it cannot diminish the injury sustained through defendant's charge that the plaintiff's actual conduct was bad, so long as his reputation remained good. It has been held in New York that evidence of the plaintiff's reputation as a common libeller may be shown in mitigation.[138]

In a case in the United States Circuit Court, it was said that the high and established character of the plaintiff could be shown in mitigation, since there was less chance of such a character being injured.[139] This doctrine, if established, would lead to the curious result that only a person of no character at all, either good or bad, could resist the introduction of evidence by the defendant as to his character. Yet, on the whole, the doctrine seems to be sound; and if so, either party can introduce evidence of good or bad character, that the jury, having all the facts, may the better estimate the amount of damage.

§ 452. Truth.

Originally in slander under the general issue, the defendant might avail himself of any defence. But it was decided in

Rhode Island: Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina: Sawyer *v.* Eifert, 2 N. & McC. 511.

Vermont: Bowen *v.* Hall, 20 Vt. 232.

[134] *New York:* Heaton *v.* Wright, 10 How. Pr. 79.

Texas: Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

Virginia: Dillard *v.* Collins, 25 Gratt. 343.

So where defendant had charged plaintiff with entering a house and stealing, defendant was allowed to show in mitigation that plaintiff had entered the house to commit statutory rape upon the owner's minor daughter. O'Connor *v.* Press Pub. Co., 34 Misc. 564, 70 N. Y. Supp. 367.

[135] Brinkmann *v.* Taylor, 105 Fed. 773; Edwards *v.* Kansas City Times Co., 32 Fed. 813.

[136] *Maine:* True *v.* Plumley, 36 Me. 466.

New York: Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. 409.

[137] 98 Fed. 925, 40 C. C. A. 163.

[138] Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560.

[139] Broughton *v.* McGrew, 39 Fed. 672.

England at an early day,[140] that if the defendant intended to justify, he should plead his justification, in order that the plaintiff might know what defence he was to meet. In New York it was held that if the defendant justified he admitted the malice, and could not resort to any defence based upon the absence of malice. So, mitigating circumstances having a tendency to prove the truth of the charge could not be given in evidence under the general issue in diminution of damages; but any circumstances which disprove malice, but do not tend to prove the truth of the charge, are admissible.[141] This rule, that facts tending to prove the truth of the charge cannot be shown in mitigation of damages, has been abrogated in New York by the Code of Procedure.[142] A similar relaxation of the rule obtains also in some other jurisdictions.[143] But in most of the cases the rule that nothing which tends to prove the truth of the charge can be received in mitigation, is adhered to.[144]

[140] Underwood *v.* Parks, Strange, 1200.

[141] Gilman *v.* Lowell, 8 Wend. 573.

[142] Code. Civ. Proc., § 535. Since that act the defendant may give in evidence any circumstances tending to disprove malice although they also tend to prove the charge. Bush *v.* Prosser, 11 N. Y. 347 (reversing s. c. 13 Barb. 221), and Bisbey *v.* Shaw, 12 N. Y. 67.

[143] *Alabama:* Advertiser Co. *v.* Jones, 53 So. 759 (see Scott *v.* McKinnish, 15 Ala. 662).

District of Columbia: Cooke *v.* O'Brien, 2 D. C. (2 Cr. C . C.) 17.

Florida: Jones *v.* Townsend, 21 Fla. 431.

Georgia: Ransone *v.* Christian, 49 Ga. 491 (but see Richardson *v.* Roberts, 23 Ga. 215).

Maryland: Wagner *v.* Holbrunner, 7 Gill, 296.

Michigan: Huson *v.* Dale, 19 Mich. 17, 2 Am. Rep. 66.

New York: Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; W. T. Hanson Co. *v.* Collier, 119 App. Div. 794, 104 N. Y. Supp. 787.

Vermont: Hutchinson *v.* Wheeler, 35 Vt. 330.

England: Knobell *v.* Fuller, Peake's Add. Cas. 139.

[144] *Connecticut:* Swift *v.* Dickerman, 31 Conn. 285 (see Bailey *v.* Hyde, 3 Conn. 463, 8 Am. Dec. 202).

Illinois: Storey *v.* Early, 86 Ill. 461; Nolte *v.* Herter, 65 Ill. App. 430.

Indiana: Abshire *v.* Cline, 3 Ind. 115.

Kentucky: Samuel *v.* Bond, Litt. Sel. Cas. 158 (*semble*).

Massachusetts: Alderman *v.* French, 1 Pick. 1; Brickett *v.* Davis, 21 Pick. 407.

New Hampshire: Knight *v.* Foster, 39 N. H. 576.

Pennsylvania: Updegrove *v.* Zimmerman, 13 Pa. 619; Stees *v.* Kemble, 27 Pa. 112; Smith *v.* Smith, 39 Pa. 441; Porter *v.* Botkins, 59 Pa. 484, 11 Am. Dec. 130.

Tennessee: Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131 (but see West *v*, Walker, 2 Swan, 32).

Virginia: Bourland *v.* Eidson, 8 Gratt. 27; McAlexander *v.* Harris, 6 Munf. 465.

In Indiana, although the same evidence is required to establish the plea of justification of slander, consisting in charging the plaintiff with a criminal offence, as would be necessary to convict him of the offence in a criminal prosecution,[145] evidence insufficient to establish the plea may be considered in mitigation of damages.[146]

§ 453. Retraction.

In an action of slander, a *recantation* of the slanderous charge may be admissible in evidence, in mitigation of damages;[147] and so too the publication of an exculpatory letter of the plaintiff's attorney.[148] A retraction must be in public, or in a mode to qualify the slander, in order to be of any avail.[149] And it must be so seasonable as really to lessen the damage. In Evening News Association *v.* Tryon[150] the court said: "After the libellous article has run its course, a retraction could in no sense mitigate the injury sustained. Indeed, at such a late day, a retraction would but revive the scandal and might be an aggravation rather than otherwise." Failure, despite reasonable opportunity, to publish a retraction has been deemed evidence upon the point of punitive damages.[151]

§ 454. Rule in Louisiana.

* It has been distinctly declared in Louisiana that no proof of damage is necessary to entitle the plaintiff to recover in

[145] Landis *v.* Shanklin, 1 Ind. 92; Shoulty *v.* Miller, 1 Ind. 544; Swails *v.* Butcher, 2 Ind. 84.

[146] Landis *v.* Shanklin, 1 Ind. 92; Shoulty *v.* Miller, 1 Ind. 544.

[147] *Alabama:* Bradford *v.* Edwards, 32 Ala. 628.

California: Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Georgia: Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139.

Illinois: Storey *v.* Wallace, 60 Ill. 51.

Indiana: White *v.* Sun Pub. Co., 164 Ind. 426, 73 N. E. 890.

Iowa: Hulbert *v.* New Nonpareil Co., 111 Iowa, 490, 82 N. W. 928.

Kentucky: Morgan *v.* Lexington Herald Co., 138 Ky. 637, 128 S. W. 1064.

New York: Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Hotchkiss *v.* Oliphant, 2 Hill, 510.

Canada: Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

[148] Cass *v.* New Orleans Times, 27 La. Ann. 214.

[149] Kent *v.* Bonzey, 38 Me. 435.

[150] 42 Mich. 549, 550.

[151] *North Carolina:* Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

Pennsylvania: Clark *v.* North American Co., 203 Pa. 346, 53 Atl. 237.

actions of libel, and that the pecuniary damage is never the sole rule of assessment.[152] **

§ 455. Slander of title.

* It is also necessary to notice the action of slander of title of real estate. A false statement made maliciously with reference to the title to real estate, is a good cause of action; but the malice cannot be inferred from the falsehood: in order to recover substantial damages, they must be proved to have resulted from the false statement.[153] **

To maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged and proved. Where the plaintiff, before the speaking of the words, had entered into a written contract with a third person, for the sale to him of the lands in relation to which the words were spoken; and the purchaser afterwards, in consequence of these words, having become dissatisfied with his purchase, the contract was, at his request, cancelled by the plaintiff, and part of the purchase-money which had been paid returned to him (the loss of a sale to that person being the only special damage alleged); it was held that the action could not be maintained; that the damages (if any) sustained by the plaintiff were the consequence of his own voluntary act, and not of the words spoken by the defendant.[154] And in Burkett *v.* Griffith [155] it was laid down that while a slanderer of title might be liable for a third party's failure to enter upon a contract, the latter's refusal to execute one gave rise to an action against himself alone. But for damage proximately caused by the falsehood, including injury to business [156] and the expenses of litigation, even, according to Chesebro *v.* Powers,[157] beyond taxable costs, the defendant is accountable.

[152] Daly *v.* Van Benthuysen, 3 La. Ann. 69; Levert *v.* Daily States Pub. Co., 123 La. 594, 49 So. 206; Jozsa *v.* Moroney, 125 La. 813, 51 So. 908.

[153] Brook *v.* Rawl, 4 Exch. 521; Pitt *v.* Donovan, 1 M. & S. 639; Malachy *v.* Soper, 3 Bing. N. C. 371.

[154] Kendall *v.* Stone, 5 N. Y. 14.

[155] 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

[156] Ryan *v.* Hower Brewing Co., 13 N. Y. Supp. 660.

[157] 78 Mich. 472, 44 N. W. 290.

II.—Malicious Prosecution and False Imprisonment

§ 456. Malicious prosecution—Elements of damage.

We next consider a class of actions where the defendant wrongfully caused the arrest and imprisonment of the plaintiff, or otherwise maliciously set in motion the machinery of the law, to his damage. Where the defendant himself was concerned in the arrest, an action for false imprisonment lies; otherwise the action must be one of those actions upon the case, the gist of which is malice, such as malicious prosecution, malicious attachment, etc.; and first of malicious prosecution.

Three sorts of damage will support an action for a malicious indictment: first, to a man's fame; second, to his person, as where he is put in danger of losing his life, or limb, or liberty; third, to his property, as where he is forced to expend money to acquit himself of the crime charged.[158] It has been held in New York that the jury in this action cannot, upon the question of malice and in determining the amount of damages, take into consideration facts which establish against some of the defendants a case of false imprisonment, as such facts constitute a distinct cause of action, for which those defendants may be rendered liable in another suit.[159] It is intimated by Cockburn, C. J., that in estimating damages in an action for false imprisonment and malicious prosecution, the jury must consider not only the sufferings and loss of the plaintiff, but also the necessity which exists for the occasional prosecution of innocent persons in order to prevent the escape of criminals from justice.[160] If the observation of this very eminent judge be sound, it introduces into the rule of damages a principle neither based on the notion of compensation nor on those of example and punishment, and one which we think has never been distinctly recognized.

Compensatory damages could not properly be affected by evidence that plaintiff's wife was dead, and he had four children to support.[161]

[158] Savile *v.* Roberts, 1 Ld. Raym. 374.

[159] Carpenter *v.* Shelden, 5 Sand. (N. Y.) 77.

[160] Tulley *v.* Corrie, 16 L. T. R. N. S. 796.

[161] Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691.

§ 457. Physical injury.

Compensation may be recovered for injury to the person by being imprisoned upon the defendant's charge,[162] such as injury to the health.[163] So compensation may be recovered for being rendered insane by the imprisonment.[164] In a few jurisdictions it is held that the plaintiff cannot recover for any effects of imprisonment such as being confined in filthy or unhealthy quarters, and for physical suffering caused by cold, want of a bed, and deprivation of food, because these were the acts of persons over whom defendant had no control, and whose conduct he had no knowledge of and no occasion to anticipate.[165] But by the better doctrine the condition of the jail and the treatment of the prisoners in the ordinary course may be shown, since the circumstances of the imprisonment are the natural results of the prosecution.[166] But where the loss complained of is really remote from the prosecution damages cannot be recovered for it; as where plaintiff's name was entered in a book open to inspection, an indignity neither required by law nor by known custom.[167]

§ 458. Injury to feelings, reputation, and liberty.

Compensation may be recovered for the wrong and indig-

[162] *Arkansas:* Lavender *v.* Hudgens, 32 Ark. 763.

Massachusetts: Morrow *v.* Wheeler & W. Mfg. Co., 165 Mass. 349, 43 N. E. 105 (*semble*).

[163] *Indiana:* Lytton *v.* Baird, 95 Ind. 349.

New York: Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

Wisconsin: Plath *v.* Braunsdorff, 40 Wis. 107.

[164] Plath *v.* Braunsdorff, 40 Wis. 107.

[165] *Connecticut:* Seidler *v.* Burns, (Conn.), 79 Atl. 53.

Pennsylvania: Zebley *v.* Storey, 117 Pa. 478, 12 Atl. 569 (in which the case of Abrahams *v.* Cooper, cited in the next note, was not referred to).

In *Iowa* the case of Flam *v.* Lee, 116 Iowa, 289, 90 N. W. 70, 93 Am. St. Rep. 242, has been cited as taking this view, but it is there held that the condition of the jail may be shown to enhance the damages though the defendant would not be responsible for intentional acts of abuse by the officers.

[166] *Iowa:* Flam *v.* Lee, 116 Ia. 289, 90 N. W. 70, 93 Am. St. Rep. 242.

Kansas: Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

Pennsylvania: Abrahams *v.* Cooper, 81 Pa. 232.

Texas: San Antonio & A. P. Ry. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

Wisconsin: Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

[167] Garvey *v.* Wayson, 42 Md. 178.

nity,[168] and for injury to the reputation.[169] In Michigan it has been said that the plaintiff could recover compensation for the loss of society of his family, injury to his fame, personal mortification and the smart and injury of the malicious arts and acts of oppression of the defendant.[170] But where the plaintiff had been arrested for theft, he was not allowed to show that his name was entered in the detective's book, and publicity thus given to it, without showing that this was done in accordance with law, or that the defendant knew it would be done.[171] Compensation may also be recovered for the deprivation of liberty [172] and for the risk of conviction,[173]

[168] *Arkansas:* Lavender *v.* Hudgens, 32 Ark. 763.

Delaware: Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Indiana: Lytton *v.* Baird, 95 Ind. 349.

Maine: Tompson *v.* Mussey, 3 Me. 305.

Maryland: McWilliams *v.* Hoban, 42 Md. 56.

Oklahoma: Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

[169] *United States:* Blunk *v.* Atchison, T. & S. F. R. R., 38 Fed. 311; Ambs *v.* Atchison, T. & S. F. R. R., 114 Fed. 317.

Arkansas: Lavender *v.* Hudgens, 32 Ark. 763.

Delaware: Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Indiana: Lytton *v.* Baird, 95 Ind. 349.

Michigan: Fine *v.* Navarre, 104 Mich. 93, 62 N. W. 142.

Nebraska: Miles *v.* Walker, 66 Neb. 728, 92 N. W. 1014.

New York: Sheldon *v.* Carpenter, 4 N. Y. 578; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

Oklahoma: Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

South Dakota: Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Washington: Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

To show injury to reputation, publication of the fact of prosecution in the newspapers may be shown. Cooney *v.* Chase, 81 Mich. 203, 41 N. W. 833.

So may comment on the prosecution by a newspaper. Minneapolis Threshing Mach. Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934.

In *Texas*, however, it has been held that loss of reputation is not an element in compensatory damages, and can be shown only to affect the amount of exemplary damages. Curlee *v.* Rose, 27 Tex. Civ. App. 259, 65 S. W. 197.

[170] Hamilton *v.* Smith, 39 Mich. 222.

[171] Garvey *v.* Wayson, 42 Md. 178.

[172] *Delaware:* Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Michigan: Hamilton *v.* Smith, 39 Mich. 222.

New York: Sheldon *v.* Carpenter, 4 N. Y. 578.

North Dakota: Merchant *v.* Pickle, 10 N. D. 48, 84 N. W. 574.

Oklahoma: Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

Pennsylvania: Abrahams *v.* Cooper, 81 Pa. 232.

Contra, Shipman *v.* Fletcher, 20 D. C. 245, where it is held that the arrest is a separate cause of action, and is not caused by the prosecution.

[173] *Arkansas:* Lavender *v.* Hudgens, 32 Ark. 763.

and for the mental suffering and sense of humiliation,[174] and for the loss of social standing.[175]

§ 459. Pecuniary loss.

The pecuniary loss resulting from the prosecution may be recovered. So the plaintiff may get compensation for loss of credit and injury to his business.[176] The attorney's fees in the previous action can generally be recovered.[177] And it has been held that the plaintiff can recover the charges sustained by him in defending the original suit, in excess of his taxable costs.[178] In fact, the court usually says merely that the reasonable expense of defending the criminal action is recoverable.[179]

Pennsylvania: Abrahams *v.* Cooper, 81 Pa. 232.

[174] *United States:* Ambs *v.* Atchison, T. & S. F. R. R., 114 Fed. 317.

California: Shatto *v.* Crocker, 87 Cal. 629, 25 Pac. 921.

Iowa: Rule *v.* McGregor, 115 Ia. 323, 88 N. W. 814.

Montana: Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. 33.

North Dakota: Merchant *v.* Pickle, 10 N. D. 48, 84 N. W. 574.

Oklahoma: Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

South Dakota: Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Washington: Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

The plaintiff may therefore show that he was arrested in the presence of his family. Flam *v.* Lee, 116 Ia. 289, 90 N. W. 70, 93 Am. St. Rep. 242.

The prolongation of the mental suffering during a continuance of the criminal case for the purpose of enabling the present plaintiff to prepare his defense may be shown, as that was the proximate result of the prosecution. Cramer *v.* Barmon, 136 Mo. App. 653, 118 S. W. 1179.

[175] *United States:* Ambs *v.* Atchison, T. & S. F. R. R. 114 Fed. 317.

Iowa: Flam *v.* Lee, 116 Ia. 289, 90 N. W. 70, 93 Am. St. Rep. 242.

[176] *Illinois:* Lawrence *v.* Hagerman, 56 Ill. 68.

Oklahoma: Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

South Dakota: Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Wisconsin: Magmer *v.* Renk, 65 Wis. 364.

[177] *Arkansas:* Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496.

Illinois: Krug *v.* Ward, 77 Ill. 603.

Indiana: Walker *v.* Pittman, 108 Ind. 341, 9 N. E. 175.

Minnesota: Mitchell *v.* Davies, 51 Minn. 168, 53 N. W. 863 (if value is proved).

North Dakota: Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615 (if proved to be reasonable).

Texas: Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

Contra, however, in the Federal courts. Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116.

[178] Closson *v.* Staples, 42 Vt. 209.

[179] *United States:* Blunk *v.* Atchison, T. & S. F. R. R., 38 Fed. 311; Ambs *v.* Atchison, T. & S. F. R. R., 114 Fed. 317.

Arkansas: Lavender *v.* Hudgens, 32 Ark. 763; Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496.

Delaware: Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

The loss of the plaintiff's time is also an element of recovery,[180] but not profits as such, although their average amount may be considered by the jury as a fact tending to show the magnitude of the injury.[181]

§ 460. Mitigation.

Evidence of the plaintiff's bad character is admissible in mitigation of damages.[182] In Georgia the advice of counsel is of itself no defence to an action of malicious prosecution; but, if given *bona fide*, it is a circumstance to be considered on the question of probable cause and in mitigation of damages.[183] But in Illinois it seems that advice of counsel is a defence, and it has been held that the advice of a detective may be shown in mitigation.[184]

It may be shown in mitigation of damages that the plain-

Kansas: Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

Massachusetts: Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

Michigan: Hamilton *v.* Smith, 39 Mich. 222.

Minnesota: Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939.

New York: Sheldon *v.* Carpenter, 4 N. Y. 578; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

South Dakota: Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Texas: Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

In Mitchell *v.* Davies, 51 Minn. 168, 53 N. W. 863, it was held that no evidence of such expenses could be introduced until the reasonable value was proved; but in Blazek *v.* McCartin, 106 Minn. 461, 119 N. W. 215, it was said that "the Mitchell case proceeds along technical lines, and should not be extended."

In Aldrich *v.* Island E. T. & T. Co. (Wash.), 113 Pac. 264, it was held that while the expense of defending the criminal suit may be recovered, the expense of obtaining a transcript of the evidence in that suit may not be. The plaintiff had already been discharged and the prosecution ended when that expense was incurred.

[180] *United States:* Blunk *v.* Atchison, T. & S. F. R. R., 38 Fed. 311; Ambs *v.* Atchison, T. & S. F. R. R., 114 Fed. 317.

Michigan: Hamilton *v.* Smith, 39 Mich. 222.

South Dakota: Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Texas: Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

Washington: Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

Anticipated loss of time in the future from failure to obtain employment cannot ordinarily be recovered, as it could not be proved with sufficient certainty. Missouri, K. & T. Ry. *v.* Groseclose, 50 Tex. Civ. App. 525, 110 S. W. 477.

[181] Sturgis *v.* Frost, 56 Ga. 188.

[182] *Illinois:* Rosenkrans *v.* Barker, 115 Ill. 331.

Maine: Fitzgibbon *v.* Brown, 43 Me. 169.

Massachusetts: Bacon *v.* Towne, 4 Cush. 217.

[183] Fox *v.* Davis, 55 Ga. 298.

[184] Hirsch *v.* Feeney, 83 Ill. 548.

tiff voluntarily surrendered himself to the officer and was really never arrested at all, except in a technical sense; since this shows that no damages should be allowed for the ignominy and disgrace of arrest.[185]

§ 461. False imprisonment—loss of time.

The action for false imprisonment lies, as has been seen, where the defendant himself made the arrest. It is not necessary to the maintenance of this action that there has been a real or pretended arrest; it also lies where the plaintiff was restrained of his liberty, without any pretence that it was done in pursuance of legal authority. The plaintiff in this action may recover for his loss of time,[186] and the interruption to his business,[187] or loss of employment.[188]

§ 462. Bodily and mental suffering.

The plaintiff may recover compensation for the bodily and mental suffering caused by the imprisonment,[189] and for the

[185] Chatfield *v.* Bunnell, 59 Conn. 511, 37 Atl. 1074.

[186] *United States:* Jay *v.* Almy, 1 W. & M. 262.

Delaware: Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

District of Columbia: Kilbourn *v.* Thompson, McA. & M. 401.

Louisiana: Wentz *v.* Bernhardt, 37 La. Ann. 636.

Massachusetts: Morgan *v.* Curley, 142 Mass. 107.

Mississippi: Hewlett *v.* Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Missouri: State *v.* Evans, 83 Mo. App. 301.

Pennsylvania: Duggan *v.* Baltimore & O. R. R., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193.

Texas: Hays *v.* Creary, 60 Tex. 445; Gold *v.* Campbell (Tex. Civ. App.), 117 S. W. 463.

Virginia: Parsons *v.* Harper, 16 Gratt. 64; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 373.

[187] *District of Columbia:* Kilbourn *v.* Thompson, McA. & M. 401.

Pennsylvania: Duggan *v.* Baltimore & O. R. R., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98; Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193.

See *Texas:* Gold *v.* Campbell (Tex. Civ. App.), 117 S. W. 463.

[188] Wentz *v.* Bernhardt, 37 La. Ann. 636.

[189] *Alabama:* Shannon *v.* Simms, 146 Ala. 673, 40 So. 574.

California: Neves *v.* Costa, 5 Cal. App. 111, 89 Pac. 860, 865; Gomez *v.* Scanlon, 155 Cal. 528, 102 Pac. 12.

Delaware: Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

Indiana: Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa: Young *v.* Gormley, 120 Ia. 372, 94 N. W. 922.

Kentucky: Johnson *v.* Collins, 89 S. W. 253, 28 Ky. L. Rep. 375.

Massachusetts: Paine *v.* Kelley, 197 Mass. 22, 83 N. E. 8.

indignity,[190] and humiliation, shame and disgrace.[191] Evidence may be given of the circumstances of plaintiff's family as bearing on the mental suffering resulting from the imprisonment.[192] So compensation may be recovered for the deprivation of liberty.[193]

§ 463. Expense of release.

The expense of obtaining release from imprisonment may be recovered.[194] So costs actually paid in the former action and

Michigan: Ross *v.* Leggett, 61 Mich. 445.

Missouri: State *v.* Evans, 83 Mo. App. 301.

New Jersey: Cone *v.* Central R. R., 62 N. J. L. 99, 40 Atl. 780.

Pennsylvania: Duggan *v.* Baltimore & O. R. R., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98.

Texas: Hays *v.* Creary, 60 Tex. 445; Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956; Gold *v.* Campbell (Tex. Civ. App.), 117 S. W. 463.

Virginia: Parsons *v.* Harper, 16 Gratt. 64; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 373.

So recovery may be had for impairment of health. Johnson *v.* Collins, 89 S. W. 253, 28 Ky. L. R. 375.

For nervous prostration. Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329.

Publication of the facts in a newspaper may be shown to enhance damages: Scott *v.* Flowers, 50 Neb. 675, 84 N. W. 81.

[190] *California:* Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

Massachusetts: Morgan *v.* Curley, 142 Mass. 107, 7 N. E. 726.

Missouri: State *v.* Evans, 83 Mo. App. 301.

Virginia: Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 373.

[191] *California:* Neves *v.* Costa, 5 Cal. App. 111, 89 Pac. 860; Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

Delaware: Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

Indiana: Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa: Young *v.* Gormley, 120 Iowa, 372, 94 N. W. 922.

Mississippi: Hewlett *v.* Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Missouri: State *v.* Evans, 83 Mo. App. 301.

New York: Ball *v.* Horrigan, 19 N. Y. Supp. 913.

Pennsylvania: Duggan *v.* Baltimore & O. R. R., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98.

Utah: Vanderberg *v.* Connoly, 18 Utah, 112, 54 Pac. 1097.

[192] Fenelon *v.* Butts, 53 Wis. 344.

[193] *District of Columbia:* Kilbourn *v.* Thompson, McA. & M. 401.

Utah: Vanderberg *v.* Connoly, 18 Utah, 112, 54 Pac. 1097.

[194] *California:* Neves *v.* Costa, 5 Cal. App. 111, 89 Pac. 860.

Delaware: Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

Louisiana: Wentz *v.* Bernhardt, 37 La. Ann. 636.

Mississippi: Hewlett *v.* Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Pennsylvania: Duggan *v.* Baltimore & O. R. R., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672.

Utah: Vanderberg *v.* Connoly, 18 Utah, 112, 125, 54 Pac. 1097.

properly alleged are recoverable.[195] And in Wisconsin it is held that under a proper averment, counsel fees in procuring the plaintiff's discharge may be recovered if the plaintiff was liable for them, although they had not been actually paid.[196] "Where a party," said Erle, C. J., in the case of Bradlaugh *v.* Edwards,[197] "has been illegally imprisoned, and has been put to expense in procuring his discharge, he may very well urge that fact before the jury as an aggravation, but he has no *right* to demand to be reimbursed *ex debito justitiæ*." And the court refused to grant a new trial, which was demanded on the ground that the plaintiff had incurred an expense of £7 14*s*. in procuring his discharge from custody at a police station where he had been detained on a charge of assault which proved unfounded. It has been held, however, in New York, in an action for false imprisonment, that the plaintiff may recover damages for the time spent, and expenses incurred, in procuring his discharge upon *habeas corpus*, where the application for the discharge was not palpably unnecessary. It does not appear, from the opinion, that these damages were specially alleged.[198] So where the plaintiff, who had been committed to jail for manslaughter, by a coroner's warrant, was afterwards admitted to bail, and subsequently got the inquisition under which he had been committed quashed, it was held, in an action against the coroner for false imprisonment, in which was alleged as special damage that plaintiff had been obliged to pay money in procuring his discharge from

Virginia: Parsons *v.* Harper, 16 Gratt. 64; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

Even where a valid debt was paid to secure a discharge from the unlawful imprisonment, the amount so paid may be recovered. Taylor *v.* Coolidge, 64 Vt. 506, 24 Atl. 656.

Expenses incurred after the imprisonment has ceased, as in defending the prosecution commenced by the illegal imprisonment, should not be recovered, as these expenses were not caused by the imprisonment. Worden *v.* Davis, 108 N. Y. Supp. 221, 123 App. Div. 193.

But see Gold *v.* Campbell, 117 S. W. 463, (Tex. Civ. App.).

[195] Pritchett *v.* Boevey, 1 Cr. & M. 775.

[196] Bonesteel *v.* Bonesteel, 30 Wis. 511.

[197] 11 C. B. (N. S.) 377, 384.

[198] Blythe *v.* Tompkins, 2 Abb. Pr. 468. But in another case in New York it was held that fees paid to an attorney for getting rid of an illegal arrest were special damages, and must be laid in the declaration. Strang *v.* Whitehead, 12 Wend. 64.

custody, that he was entitled to recover the costs of quashing the inquisition.[199]

§ 464. Consequential damages.

In an action of false imprisonment, the defendant had given the plaintiff into custody on a charge of felony. The magistrate heard the charge, and remanded the prisoner. It subsequently appearing that the charge had been made under a mistake, the plaintiff was released. The declaration charged the first arrest and the remand as distinct acts of trespass, and damages were given for both, although the latter was the act of the magistrate, on the ground that the wrongdoer was responsible for it as the consequence of his wrongful act; but this was held erroneous, and a new trial was granted, on the ground that the defendant was not responsible for the act of the magistrate.[200] This decision must be supported, if at all, upon the particular facts of the case. The natural consequences of the arrest are subjects of compensation, and the remand may surely be a natural result of the arrest. By the better view, the condition of the jail in which the plaintiff is confined and the circumstances of the imprisonment may be shown to enhance the damages, as the confinement is a proximate consequence of the original imprisonment.[201] So compensation may be recovered for having been manacled and compelled to labor in common with other prisoners.[202]

[199] Foxall *v.* Barnett, 2 E. & B. 928.

[200] Lock *v.* Ashton, 12 Q. B. 871. The decision perhaps turns on the form of action; the court suggesting that consequential damages should be recovered in case, not in trespass. See to the same effect Lyden *v.* McGee, 16 Ont. 105.

[201] *Alabama:* Fuqua *v.* Gambill, 140 Ala. 464, 37 So. 235.

California: Miller *v.* Fano, 134 Cal. 103, 66 Pac. 183.

District of Columbia: Kilbourn *v.* Thompson, MacA. & M. 401.

Mississippi: Hewlett *v.* Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Texas: San Antonio & A. P. Ry. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Southwestern P. C. Co. *v.* Reitzen (Tex. Civ. App.), 135 S. W. 237.

Wisconsin: Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501.

Contra, in *New York,* on the ground that the subsequent detention and circumstances of the imprisonment are not chargeable to the defendant. Baker *v.* Secor, 4 N. Y. Supp. 303; Newman *v.* N. Y., L. E. & W. R. R., 54 Hun, 335, 7 N. Y. Supp. 560.

Plaintiff cannot recover compensation for injury to his feelings by reason of a mock trial held by his fellow prisoners in jail. Southwestern P. C. Co. *v.* Reitzen (Tex. Civ. App.) 135 S. W. 237.

[202] McCall *v.* McDowell, Deady, 233.

So it was held in Illinois that the defendant, who secured the plaintiff's arrest, must compensate him for being taken into another county and confined in a filthy jail.[203] And where a seaman was wrongfully imprisoned in a foreign port by his master, and his vessel sailed without him, he was allowed compensation for the loss of his effects and the cost of his passage home.[204] A publication in a newspaper of a fair account of the arrest is a proximate consequence for which recovery may be had,[205] and so is an illness, such as nervous prostration, caused by the arrest.[206]

On the other hand, no compensation can be recovered for a remote consequence of the arrest, or one that was avoidable. So where the plaintiff might have procured his discharge by giving a bond, as he could easily have done, he cannot recover for his subsequent confinement in jail; [207] and where a person illegally arrested on poor debtor process was discharged on his own recognizance, afterwards appeared, was examined, and took the poor debtor's oath, he was not allowed to recover the expense of the examination; his recognizance did not bind him, and the effect of the arrest was spent.[208] Where plaintiff was arrested on a criminal process, but by subsequent abuse the officer became a trespasser *ab initio*, and plaintiff was discharged and the prosecution dropped, it was held that he could not recover for the injurious effect of the suppression of prosecution, but only for the effect of the arrest itself.[209] And where after an illegal arrest the plaintiff is again arrested legally, he is entitled to compensation only for the first arrest.[210]

§ 465. Aggravation.

An action of trespass being brought for false imprisonment, and a plea that the defendant had committed a felony being put in, it was held not to be a misdirection, that the judge

[203] Kindred *v.* Stitt, 51 Ill. 401.

[204] Jay *v.* Almy, 1 W. & M. 262.

[205] Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

[206] Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329.

[207] Yost *v.* Tracy, 13 Utah, 431, 45 Pac. 346.

[208] Lane *v.* Holman, 145 Mass. 221, 13 N. E. 602.

[209] Clark *v.* Tilton, 74 N. H. 330, 68 Atl. 335.

[210] *Michigan:* McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906.

Texas: Cabell *v.* Arnold (Tex. Civ. App.), 22 S. W. 62.

told the jury that the putting of such a plea on the record was a persisting in the charge contained in it, and was to be taken into account by them in estimating the damages.[211] Plaintiff may not show the mere fact that he was a married man and has a family in aggravation of compensatory damages, as that does not affect the actual damage;[212] but he may show that the arrest was made in the presence of his family as increasing his mental suffering.[213]

§ 466. Mitigation.

It has been held in Pennsylvania, that in trespass against a constable for arresting and imprisoning the plaintiff on suspicion of a felony, the bad character of the plaintiff cannot be given in evidence in mitigation of damages.[214] The fact that the defendant was advised to make the arrest by an ignorant and inexperienced attorney may be considered in mitigation.[215] And generally the information under which the defendant acted may be shown as bearing on the question of intent.[216] Evidence of good faith and want of malice is not proper where exemplary damages are not claimed.[217] In an action to recover damages of the defendant for having illegally procured the plaintiff's arrest and imprisonment for discouraging enlistments, which was done by a Federal officer on the defendant's affidavit, the defendant was allowed to prove in mitigation that the plaintiff had in fact discouraged enlistments.[218] It was held in Prentiss *v.* Shaw,[219] in an action

[211] Warwick *v.* Foulkes, 12 M. & W. 507.

[212] Young *v.* Gormley, 120 Iowa, 372, 94 N. W. 922.

[213] Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33.

[214] Russell *v.* Shuster, 8 W. & S. 308.

[215] Mortimer *v.* Thomas, 23 La. Ann. 165.

[216] *United States:* Barnes *v.* Viall, 6 Fed. 661 (mistaken computation of time).

Alabama: Sanders *v.* Davis, 153 Ala. 375, 44 So. 979 (good faith).

Maine: Palmer *v.* Maine Cent. R. R., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673 (unreasonable and suspicious conduct of plaintiff).

Michigan: Livingston *v.* Burroughs, 33 Mich. 511.

Wisconsin: Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127 (good faith).

[217] *Kansas:* Comer *v.* Knowles, 17 Kan. 436.

Wisconsin: Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501.

Such circumstances may of course be shown in mitigation of exemplary damages. Petit *v.* Colmary, 4 Pennew. (Del.) 266, 55 Atl. 344.

[218] Roth *v.* Smith, 51 Ill. 431.

[219] 56 Me. 427.

for an unlawful arrest, that the declarations of a plaintiff prior to the arrest and tending to provoke it, could not be admitted to reduce his compensation for the actual injury, but were admissible to mitigate the damages for the indignity and the punitive damages. During the Civil War the plaintiff, having publicly and indecently exulted at the assassination of the President of the United States, was arrested pursuant to a general order of the defendant, who commanded a military department. The order was illegal, but was issued without malice, and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages. On the other hand, the provocation of his language was allowed in mitigation.[220] And evidence that the plaintiff went to jail voluntarily may be admitted for the same purpose.[221] Where the arrest was upon a charge which involved damage to reputation, it may be shown that plaintiff had frequently been charged with the same offence before the arrest, as that fact tends to diminish the injury to the reputation.[222]

III.—Other Malicious Torts

§ 467. Malicious attachment.

An action lies for maliciously attaching the plaintiff's property. In Alabama it has been decided that in an action for wrongfully and vexatiously suing out an attachment auxiliary to the main suit to enable the plaintiff to obtain a lien on property for the satisfaction of whatever judgment he might recover, the costs incurred in defending the original suit constitute no part of the plaintiff's damages;[223] though the counsel fees in the suit may be proven and considered by the jury.[224] Nor can expenses incurred in attending or damages for loss of time incurred in defending the principal suit be recovered.[225] The measure of damages is said to be the actual loss from being deprived of use of property, injury to it, and expenses incurred in defending attachment proceedings.[226]

[220] McCall *v.* McDowell, Deady, 233.

[221] Yost *v.* Tracy, 13 Utah, 431, 45 Pac. 346.

[222] Texas M. R. R. *v.* Dean, 98 Tex. 517, 85 S. W. 1135.

[223] White *v.* Wyley, 17 Ala. 167.

[224] Marshall *v.* Betner, 17 Ala. 832.

[225] Craddock *v.* Goodwin, 54 Tex. 578.

[226] Boatwright *v.* Stewart, 37 Ark. 614.

Where wheat wrongfully attached advanced considerably in value pending the proceeding, but at the time of its redelivery to the defendant in the attachment had declined to about the price it bore when the process was levied, it was held that he could not recover the difference between its highest market value pending the attachment and its value at the time of the redelivery, without proof that he could or would have sold it at the advanced rate.[227] Where, however, bonds and notes belonging to a bank were wrongfully attached, and declined in value pending the attachment, the defendants were held liable for the actual loss resulting from the sale at a price lower than would have been realized but for the attachment.[228] So, in Mississippi, the depreciation in the value of wheat pending an attachment was held to be the measure of damages for the wrongful suing out of the attachment.[229] In this action evidence of the plaintiff's profits alleged to be lost by injury to his credit has been admitted, not as a measure of damages, but as an ingredient in the cause, or to guide the discretion of the jury.[230] Damages for destruction of business may be recovered.[231] A shopkeeper has been allowed, where his goods had been wrongfully attached, to recover for loss of business during the time it was suspended, and evidence was admitted as to the value of the use of such goods where the amount received per day was stated.[232] Where, in Louisiana,

[227] Meshke *v.* Van Doren, 16 Wis. 319.

[228] Horn *v.* Bayard, 11 Rob. (La.) 259.

[229] Fleming *v.* Bailey, 44 Miss. 132.

In Pratt *v.* Hampe, 114 Iowa, 237, 86 N. W. 292, an action for the malicious attachment of sweet potatoes in the ground not matured at the time of the attachment, and not dug or marketed until after the attachment was released, it was held that the measure of damages was the difference in value of the crop as it lay in the ground at the time of the attachment and at the time it was released; but query as to this, because it would seem that no use could have been made of the crop until after the release of the attachment, and if the crop had deteriorated in value during that time it would not have been by reason of the attachment, but from some other cause.

[230] Donnell *v.* Jones, 17 Ala. 689.

[231] *Massachusetts:* Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

Michigan: Haynes *v.* Knowles, 36 Mich. 407.

It was said in Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160, that these could only be recovered in an action on the case, and not in an action on the attachment bond. See, further, Wallace *v.* Finberg, 46 Tex. 35.

In Brown *v.* Master, 104 Ala. 451, 16 So. 443, damages were allowed for closing plaintiff's store and for unlawfully detaining the attached goods.

[232] Alexander *v.* Jacoby, 23 Oh. St. 358.

an attachment against a vessel was released on the execution of a mortgage on her by her master, which mortgage was void by the laws of the State, and pending the suit in which the attachment was issued the vessel passed into the hands of *bona fide* purchasers, but was not registered in the custom-house, and there was no record evidence of the change of ownership, and after final judgment decreeing her to be liable she was again seized by her attaching creditors, but released in four days without being delayed in the prosecution of her next voyage, it was held in an action by the owners for the wrongful seizure that they were entitled to nominal damages only. The court said that they had no cause to complain that they were called to make proof of ownership in a thing apparently bound for the claim of the seizing creditor.[233]

It has been held that compensation may be recovered for injury to the feelings.[234]

Recovery may be had for the proximate consequences of the malicious attachment, as for the suing out of other attachments.[235] But in an action for malicious garnishment of wages, plaintiff cannot recover compensation for being discharged from his employment because of the attachment,[236] nor in an action for the malicious garnishment of money can plaintiff recover for loss of business caused by his want of the money to pay the expenses of the business.[237]

§ 468.[a] Malicious prosecution of a civil suit.

When an action is allowed to lie for the malicious prosecution of a civil suit against the plaintiff, compensation may be recovered for the pecuniary loss; [238] but generally that is all that can be recovered, since there was no imprisonment of the plaintiff.[239] The expenses incurred by the present plain-

[a] For § 468 of the eighth edition, see §§ 486*a*, 486*c*.

[233] Hunter *v.* Bennett, 15 La. Ann. 715.

[234] Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 189.

Contra, Trawisk *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. 564.

[235] Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751.

[236] Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751.

[237] O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615.

[238] *Kentucky:* Woods *v.* Finnell, 13 Bush, 628.

Wisconsin: Magmer *v.* Renk, 65 Wis. 364.

[239] In *Louisiana,* however, in an action for the malicious prosecution

tiff in the maliciously prosecuted proceeding may be recovered;[240] and where the process involved deprivation of the use of property compensation may be recovered for that loss.[241] In a proper case, damages may also be recovered for injury to credit and reputation.[242] In Sonneborn *v.* Stewart,[243] it was said that in an action for maliciously instituting bankruptcy proceedings compensation might be recovered for the actual damage to the defendant's goods, and damages for the breaking up of his business and destruction of his credit.

§ 469. Enticement of servant.

In the action for enticing a servant from his employment, it was said that the general rule of damages is the value of the servant's time during the period he was in the defendant's employment; but that, in cases of aggravation, the jury may give the whole value of the servant;[244] this, however, referred rather to slaves than to servants. In a case of this kind in Illinois, for enticing a registered servant, it was held that the plaintiff was entitled to recover the value of the services

of an action of ejectment, it was held that plaintiff might recover for mortification, mental distress and humiliation. Deslonde *v.* O'Hern, 39 La. Ann. 14, 1 So. 286.

[240] *United States:* Sonneborn *v.* Stewart, 2 Woods, 599 (bankruptcy; but see the same case on appeal, Stewart *v.* Sonneborn, 98 U. S. 187).

Georgia: Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19.

Indiana: Whitesell *v.* Study, 37 Ind. App. 429, 76 N. E. 1010 (personal action).

New York: Gerken *v.* Ruppert, 33 Misc. 382, 67 N. Y. Supp. 589 (replevin).

In an action for malicious prosecution of garnishment proceedings it appeared that plaintiff, instead of appearing in those proceedings himself, sent an agent to answer for him; while the court held that a garnishee could not answer by agent but must appear personally. It was held that the cost of the answer by agent would not be allowed in this action. Cornell *v.* Payne, 115 Ill. 63, 3 N. E. 718.

[241] *Colorado:* Lord *v.* Guyot (Colo.), 70 Pac. 683 (property tied up by attachment).

Georgia: Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686 (plaintiff dispossessed of mill); Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19 (plaintiff dispossessed of boarding-house).

Ohio: Newark Coal Co. *v.* Upson, 40 Ohio St. 17 (injunction against mining).

In Gerken *v.* Ruppert, 33 Misc. 382, 67 N. Y. Supp. 589, a suit for the malicious prosecution of a replevin action, damages for the wrongful taking having already been recovered in the replevin suit could not be recovered again in this action.

[242] Lord *v.* Guyot, (Colo.), 70 Pac. 683.

[243] 2 Woods, 599.

[244] Dubois *v.* Allen, Anthon's N. P. 128.

lost up to the time of the commencement of the suit, the reasonable expenses necessarily incurred in getting the servant back again, and damages for the loss of time, trouble, and injury sustained until the commencement of the suit; and that, if the plaintiff lost the entire service in consequence of the defendant's act, then he was entitled to the value of the term of service.[245] So it has been held that the reasonable expenses of searching for an abducted child may be recovered by the parent.[246] And where the enticement was at the time the servants were engaged in getting in a crop, recovery may be had for damage to the crop caused by lack of hands to get it in.[247]

§ 470. Consequential damages.

In an action on the case for enticing the plaintiff's servants (who were not hired by the plaintiff for a limited or constant period, but worked by the piece), by inviting them to dinner, and inducing them to sign an agreement not to work for him; it being proved that the plaintiff, a pianoforte maker, realized about £800 per annum by the sale of his instruments, the jury found a verdict for £1,600. The plaintiff was nearly, if not absolutely, ruined. On a motion for a new trial, it was insisted that, as the men worked by the piece, each of them was justified in leaving the plaintiff when he had completed the work in hand; and that, in point of fact, the plaintiff could only be entitled to recover damages for the half-day for which his workmen accepted the defendant's invitation. The court refused to interfere on the ground that the damages were excessive; and Richardson, J., said: "The measure of damages he is entitled to receive from the defendant is not necessarily to be confined to the servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period." [248] So where the defendant entices away the farm hand of the plaintiff, the

[245] Hays *v.* Borders, 6 Ill. 46.

[246] Rice *v.* Nickerson, 9 All. 478.

[247] McCutchin *v.* Taylor, 11 Lea (Tenn.), 259.

[248] Gunter *v.* Astor, 4 Moore, 12.

latter may recover the expense of an unsuccessful attempt to replace him, and the net profits made by men of fair business capacity out of the labors of such a hand during the period for which the hand was hired.[249]

§ 470a. Maliciously procuring discharge or other breach of contract.

In an action for maliciously procuring the discharge of the plaintiff, all damages may be recovered which the plaintiff could have recovered if he had been wrongfully discharged by his master, including compensation for loss of time.[250] But even if the plaintiff could not have sued his master, as for instance if the employment was at will, he may nevertheless recover substantial damages against one who maliciously procures his discharge.[251]

And so for maliciously procuring the breach of any contract the measure of damages is ordinarily the same as it would be in an action for breach of the contract itself.[252]

§ 470b. Conspiracy.

In an action for conspiracy in restraint of trade, the plaintiff may recover his loss of profits and also the diminution in value of his property by the conspiracy.[253] And in general the measure of damages in an action for a conspiracy is what the plaintiff lost as a result of the conspiracy. So where one employed a broker to sell his land, and the broker got an offer of a cash price and certain other lots of land, but the broker and others conspired to defraud the seller by keeping him ignorant of the fact that land was offered in exchange, and as a result of the conspiracy he sold his land for the cash payment, while the defendants got title to the other land offered in exchange, the measure of damages was the value of such land, since the plaintiff would have got it but for the

[249] Lee *v.* West, 47 Ga. 311; Smith *v.* Goodman, 75 Ga. 198.

[250] *Missouri:* Lally *v.* Cantwell, 40 Mo. App. 44.

New York: Connell *v.* Stalker, 20 Misc. 423, 45 N. Y. Supp. 1048.

[251] Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

[252] Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405.

[253] Bratt *v.* Swift, 99 Wis. 579, 75 N. W. 411.

defendant's conspiracy.[254] And in an action for conspiracy to procure from a corporation a contract to construct buildings for it at a high price, the difference between the price asked and the real price to be divided between an officer of the corporation and the other conspirators, where the conspiracy succeeded, the contract was made and performed and the price paid, the measure of damages was the excess of the contract price over the real cost of the work.[255]

IV.—Seduction and Alienation of Affection

§ 471. Seduction.

* The common-law action of case, by the father or master, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction: the demand is based upon the mere loss of service; but the damages are very much at large, and in the discretion of the jury. It is very curious to see how the practice of giving damages beyond the mere value of the service has grown up. As late as the latter part of the 18th century, in a case tried before Mr. Justice Chambre, the action being brought by the father for the seduction of his natural daughter, the judge charged the jury that they must consider the female merely in the character of a servant, and award the plaintiff compensation for the loss of service only.[256] In the year 1800, Lord Eldon, then chief justice of the Common Pleas, in an action tried before him, told the jury that they were to look, not merely to the loss of service, but to the *wounded feelings* of the party.[257] In 1805, Lord Ellenborough, in a case before him, told the jury that "damages might be given for the loss which the father sustained by being deprived of the *society* and *comfort* of his child, and by the *dishonor* which he receives." [258] And finally, the same learned judge on a motion to set aside an inquisition in a case of seduction, on the ground of excessive damages, said that this proceeding was one *sui generis*, where, in estimating the damages, the parental feelings and the feelings of those who

[254] Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

[255] St. Paul Distilling Co. *v.* Pratt, 45 Minn. 215, 47 N. W. 789.

[256] Selwyn's Nisi Prius, 7th ed., 1116.

[257] See note to Andrews *v.* Askey, 8 C. & P. 7.

[258] See same note.

stood in *loco parentis*, had always been taken into consideration; and although it was difficult to conceive on what legal principles the damages could be extended ultra the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken.[259] "The action for seduction," says the Supreme Court of New York, "is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential upon a direct injury; but there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded upon special reasons only applicable to it." [260] In a case brought by the mother, in 1837, Tindal, Chief Justice of the English Common Pleas, directed the jury that they might give damages for the *distress* and *anxiety* of the plaintiff.[261] As to the right of recovery, however, the English cases adhere to the original idea on which the action is founded. So, if there is no proof of loss of service whatever, there can be no relief.[262] So, although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover.[263] In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief.**

§ 472. Damages governed by legal rules.

* Where the jury were directed, or supposed they were directed, that damages might be given for bringing up the child, the fruit of the illicit connection, the Supreme Court of New York granted a new trial, on the ground that the plaintiff, the master, was under "no legal obligation to support and educate the child; that he could not be compelled to appropriate the proceeds of the verdict to that purpose; and that the verdict would not afford the defendant any exemption from his liability to provide for the child, when called on in the regular course of the law." [264] This, in effect, declares

[259] Irwin *v.* Dearman, 11 East, 23.

[260] Whitney *v.* Hitchcock, 4 Den. 461.

[261] Andrews *v.* Askey, 8 C. & P. 7.

[262] Grinnell *v.* Wells, 7 M. & G. 1033.

[263] Eager *v.* Grimwood, 1 Ex. 61.

[264] *New York:* Hitchman *v.* Whitney, 9 Hun, 512.

that the damages are to be measured by strict legal rules, or at least asserts the principle already stated, that even in cases of aggravation, where it appears that the jury did not intend to give vindictive, but only compensatory damages, and on that point were wrongly instructed, such course will be taken as to restrict the compensation within legal limits.[265] **

§ 473. General rule.

In an action for the seduction of his daughter, the father, or one who stands in his place, recovers not only for the actual loss of his daughter's services and the medical expenses of her illness,[266] but also for his wounded feelings and affections,[267] his sense of shame, humiliation and disgrace,[268] for the wrong done him in his social and family relations,[269] and for the

Vermont: Haynes *v.* Sinclair, 23 Vt. 108.

But see *England:* Terry *v.* Hutchinson, L. R. 3 Q. B. 599, 9 B. & S. 487.

[265] Sargent *v.* ————, 5 Cow. 106. See, also, Edmondson *v.* Machell, 2 T. R. 4.

[266] *Arkansas:* Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

Illinois: Garretson *v.* Becker, 52 Ill. App. 255.

Indiana: Pruitt *v.* Cox, 21 Ind. 15.

New Jersey: Coon *v.* Moffitt, 3 N. J. L. 436; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575.

New York: Akerley *v.* Haines, 2 Cai. 292; Hogan *v.* Cregan, 6 Robt. 138.

West Virginia: Riddle *v.* McGinnis, 22 W. Va. 253.

One not a parent, but standing *in loco parentis*, recovers damages of the same character as a parent. Tittlebaum *v.* Bochmcke (N. J.), 80 Atl. 323.

[267] *Delaware:* Herring *v.* Jester, 2 Houst. 66.

Georgia: Kendrick *v.* McCrary, 11 Ga. 603.

Illinois: Garretson *v.* Becker, 52 Ill. App. 255.

Indiana: Pruitt *v.* Cox, 21 Ind. 15; Felkner *v.* Scarlet, 29 Ind. 151; Taylor *v.* Shelkett, 66 Ind. 297.

Massachusetts: Hatch *v.* Fuller, 131 Mass. 574.

New Hampshire: Lunt *v.* Philbrick, 59 N. H. 59.

New Jersey: Coon *v.* Moffitt, 3 N. J. L. 436; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575.

Pennsylvania: Hornketh *v.* Barr, 8 S. & R. 36.

Virginia: Clem *v.* Holmes, 33 Gratt. 722.

For a father's loss of the comfort and consolation in the virtue of his daughter, and for the loss of hope in her future. Barbour *v.* Stephenson, 32 Fed. 66.

[268] *Arkansas:* Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

Illinois: Garretson *v.* Becker, 52 Ill. App. 255.

New Jersey: Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575.

West Virginia: Riddle *v.* McGinnis, 22 W. Va. 253.

[269] *Delaware:* Herring *v.* Jester, 2 Houst. 66.

Oregon: Parker *v.* Monteith, 7 Ore. 277.

Virginia: Clem *v.* Holmes, 33 Gratt. 722.

stain and dishonor brought on the family.[270] And in order to estimate such injuries, the general good character of the plaintiff's family may be shown.[271]

§ 474. Exemplary damages.

As a general rule, exemplary damages may always be given.[272] Even where the relation of master and servant exists by convention only, as where the plaintiff's daughter is of age, the recovery will not necessarily be restricted to compensatory damages.[273] Nor although the statute authorizes the daughter to sue in her own name, will they be thus restricted in an action brought by the father.[274]

§ 475. Aggravation.

Evidence of the pecuniary condition of both plaintiff and defendant has been held admissible, not for the purpose of ascertaining how much the defendant can pay, but how much the plaintiff has been injured.[275] Evidence of an abortion

[270] *Delaware:* Herring *v.* Jester, 2 Houst. 66.

Georgia: Kendrick *v.* McCrary, 11 Ga. 603.

Illinois: Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906; Garretson *v.* Becker, 52 Ill. App. 255.

Indiana: Felkner *v.* Scarlet, 29 Ind. 154; Taylor *v.* Shelkett, 66 Ind. 297.

Kentucky: Wilhoit *v.* Hancock, 5 Bush, 567.

New Jersey: Coon *v.* Moffitt, 3 N. J. L. 436; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575.

Oregon: Parker *v.* Monteith, 7 Ore. 277.

Pennsylvania: Hornketh *v.* Barr, 8 S. & R. 36.

Virginia: Clem *v.* Holmes, 33 Gratt. 722.

Canada: Paterson *v.* Wilcox, 20 Up. Can. C. P. 385.

[271] *Oregon:* Parker *v.* Monteith, 7 Ore. 277.

Pennsylvania: Wilson *v.* Sproul, 3 Pen. & W. 49.

West Virginia: Riddle *v.* McGinnis, 22 W. Va. 253.

[272] *Illinois:* Ball *v.* Bruce, 21 Ill. 161.

New York: Bartley *v.* Richtmyer, 4 N. Y. 38, 44; Ingersoll *v.* Jones, 5 Barb. 661.

England: Edmondson *v.* Machell, 2 T. R. 4; Irwin *v.* Dearman, 11 East, 23.

[273] Lipe *v.* Eisenlerd, 32 N. Y. 229; Badgley *v.* Decker, 44 Barb. 577.

[274] Stevenson *v.* Belknap, 6 Ia. 97.

[275] *Delaware:* Herring *v.* Jester, 2 Houst. 66.

Illinois: White *v.* Murtland, 71 Ill. 250.

North Carolina: McAulay *v.* Birkhead, 13 Ind. 28; so to affect exemplary damages.

Virginia: Clem *v.* Holmes, 33 Gratt. 722.

Wisconsin: Lavery *v.* Crooke, 52 Wis. 612.

But *contra:*

Michigan: Watson *v.* Watson, 53 Mich. 168.

New York: Dain *v.* Wycoff, 7 N. Y. 191.

produced by the defendant is not inadmissible on the ground that the damages it tends to prove are too remote.[276] It has been held that in this action no evidence can be given as to any promise of marriage, either with reference to the right of action or measure of damages; the remedy for the breach of that contract belonging to the female in her own name.[277] Thus, in the King's Bench, Lord Ellenborough said: "The daughter may be asked whether the defendant paid his addresses to her in an honorable way; further than that you can on no account go." [278] So in New York, in such a case, it has been held incorrect to admit this description of evidence, whether the judge instructs the jury that they may give damages for the seduction and also for the breach of the promise, or whether he admits it only to prove the seduction, but not to enhance the damages.[279]

§ 476. Mitigation.

Proof of indifference on the plaintiff's part, in affording opportunities of criminal intercourse between his daughter and the defendant, may be admitted in mitigation of damages,[280] but not of a seeming insensibility on the part of the father to his daughter's disgrace.[281] Nor is it competent for the defendant to show that the daughter consented willingly to the seduction, nor even that she, in fact, seduced the defendant, her consent not depriving the plaintiff of his right of action.[282] But the unchastity of the daughter previous to the defendant's act will mitigate the damages, and may reduce them to mere compensation for loss of service and expense of lying in.[283] Nor can an offer to marry the female

[276] *Illinois:* Whiter *v.* Murtland, 71 Ill. 250.

Wisconsin: Klopfer *v.* Bromme, 26 Wis. 372.

[277] Whitney *v.* Elmer, 60 Barb. 250.

Contra, Parker *v.* Monteith, 7 Ore. 77.

[278] Dodd *v.* Norris, 3 Camp. 519. See, also, Tullidge *v.* Wade, 3 Wils. 18.

[279] Foster *v.* Scoffield, 1 Johns. 297; Clark *v.* Fitch, 2 Wend. 459; Gillet *v.* Mead, 7 Wend. 193. See, also, Brownell *v.* M'Ewen, 5 Denio, 367; Wells *v.* Padgett, 8 Barb. 323.

[280] Zerfing *v.* Mourer, 2 Greene (Ia.), 520.

[281] Bolton *v.* Miller, 6 Ind. 262.

[282] McAulay *v.* Birkhead, 13 Ired. 28.

[283] *Arkansas:* Simpson *v.* Grayson, 54 Ark. 404, 16 S.W. 4, 26 Am. St. Rep. 52.

Michigan: Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

New York: Akerley *v.* Haines, 2 Cai. 292; Hogan *v.* Cregan, 6 Robt. 138.

be given in evidence to mitigate the damages;[284] but actual marriage may be.[285] In an action for the seduction of the plaintiff's daughter, the defendant can show that the plaintiff was not, in fact, married to his reputed wife, as it shows that the plaintiff was not entitled to the services of his daughter.[286] A recovery by the daughter for the seduction, where such an action can be maintained, does not mitigate the damages recoverable by the father.[287]

§ 477. Action by party seduced.

Where the woman is allowed (by statute) to recover in her own name for seduction, the measure of her recovery is subject to the same rules. Thus a woman may recover for wounded feelings and dishonor,[288] for loss of social standing,[289] and for consequences such as pregnancy, childbirth, sickness, and the like.[290] Prior unchastity may be shown in mitigation;[291] and the pecuniary condition of the defendant may be shown.[292]

§ 478. Criminal conversation.

In the assessment of damages against a co-respondent in this action, the measure of damages is the value of the wife of whom the husband has been deprived.[293] This is the value of her services, conjugal aid, society, affection and comfort, less a sum represented by his obligation to clothe, support, cherish and care for her.[294] The wife's wealth is important only if it is shown that she was contributing from it toward the support of the family, thus relieving her husband from that amount of burden.[295] The husband may also recover for his suffering and dishonor.[296] So it has been said that the

[284] *Illinois:* White *v.* Murtland, 71 Ill. 250.
New York: Ingersoll *v.* Jones, 5 Barb. 661.

[285] Eichar *v.* Kistler, 14 Pa. 282.

[286] Howland *v.* Howland, 114 Mass. 517.

[287] Pruitt *v.* Cox, 21 Ind. 15.

[288] Simons *v.* Bushy, 119 Ind. 13.

[289] Hawn *v.* Banghart, 76 Ia. 683, 39 N. W. 251.

[290] McCoy *v.* Trucks, 121 Ind. 292.

[291] Stowers *v.* Singer, 24 Ky. L. Rep. 395, 68 S. W. 637.

[292] White *v.* Gregory, 126 Ind. 95, 25 N. E. 806.

[293] Cowing *v.* Cowing, 33 L. J. N. S. Prob. 149.

[294] Jenness *v.* Simpson, 81 Vt. 109, 78 Atl. 886.

[295] Jenness *v.* Simpson, 81 Vt. 109, 78 Atl. 886.

[296] *Illinois:* Browning *v.* Jones, 58 Ill. App. 597.

husband can recover more than nominal damages, even if he had not lost the affection of his wife by the act, nor had his family broken up, nor his domestic relations impaired.[297] In a case at Nisi Prius, where the husband was unaware of his wife's dishonor till she made the disclosure to him on her dying bed, and he continued to treat her with great kindness till her death, which occurred in the same month, Mr. Justice Coleridge, while instructing the jury against the allowance of vindictive damages, told them to give damages for the shock to the husband's feelings and *the loss of his wife's society* down to the time of her death.[298] In Yundt *v.* Hartrunft [299] Walker, C. J., said:

"The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true that because appellee was absent from home he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a virtuous, and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children."

§ 479. Aggravation.

If the co-respondent's fortune was used by him as a means of the seduction, it is said, in England, that it may be taken into account, but not otherwise.[300] In Peters *v.* Lake [301] it

Pennsylvania: Matheis *v.* Mazet, 164 Pa. 580, 30 Atl. 434.

[297] Stumm *v.* Hummel, 39 Ia. 478.

[298] Wilton *v.* Webster, 7 C. & P. 198.

[299] 41 Ill. 9, 12.

[300] Cowing *v.* Cowing, 33 L. J. (N. S.) Prob. 149.

[301] 66 Ill. 206.

Acc., Matheis *v.* Mazet, 164 Pa. 580, 30 Atl. 434.

was held that evidence of the defendant's pecuniary ability was admissible as affecting the question of exemplary damages.

§ 480. Mitigation.

Proof of the ill-treatment of the wife by the husband before the criminal intercourse may be received in mitigation;[302] so may the fact that the plaintiff is dissolute and immoral;[303] or that the general character of the wife is bad.[304] In Conway *v.* Nicol[305] it was held proper to show that the wife, before her marriage, had given birth to a child; but this must be taken in connection with the fact that the defendant was the father of the child, and that the plaintiff's wife had been true to her marriage vows, except with the defendant. In Stumm *v.* Hummel[306] it was held competent to show, for the purpose of ascertaining the amount of damages, that the plaintiff's wife had, before marriage, lived in the defendant's family, when he had intercourse with her; and that he had induced her to marry the plaintiff on the ground that the latter would make a good husband, and that he (the defendant) would continue to have intercourse with her. It was also held that, if the wife's bad conduct was confined to her intimacy with the defendant, and the plaintiff was induced to marry her on his recommendation that she was a good girl, then her intercourse with the defendant before marriage could not be considered in mitigation of damages. It has been held competent to show, in mitigation of damages, that the plaintiff's wife was an actress; that he concealed his marriage from his wife's mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if

[302] *Indiana:* Coleman *v.* White, 43 Ind. 429.

Iowa: Dance *v.* McBride, 43 Ia. 624.

Massachusetts: Palmer *v.* Crook, 7 Gray, 418.

New Hampshire: Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

[303] *Illinois:* Browning *v.* Jones, 52 Ill. App. 597.

New Hampshire: Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

New York: Bennett *v.* Smith, 21 Barb. 439.

Or that the wife had lost her affection for her husband. Browning *v.* Jones, 52 Ill. App. 597.

[304] *Indiana:* Clouser *v.* Clapper, 59 Ind. 548.

New Hampshire: Sanborn *v.* Neilson, 4 N. H. 501.

[305] 34 Ia. 533.

[306] 39 Ia. 478.

she were a single woman, and allowed her to continue her theatrical performances in her maiden name.[307] And so connivance by the husband may be shown in mitigation.[308]

§ 480a. Alienation of affection of a wife.

In an action for alienation of the affection of a wife the husband may recover compensation for loss of the services, society, and comfort of the wife,[309] and for the injury to his feelings and affections, and to his family pride.[310] It may be shown in mitigation that the husband had abused his wife [311] and that she did not love him,[312] and had obtained a divorce since the defendant's wrongful act; [313] or that he had no affection for his wife, that his own immoral conduct and relations with other women established the fact, and that his violence and cruelty had driven her from his home.[314]

§ 480b. Alienation of affection of a husband.

In an action for alienation of the affection of a husband the wife may recover for the loss of her husband's society and of his support and maintenance,[315] and to establish the value of these items she may show his position in life, occupation, etc.[316] Having shown these things, she may recover the cost of her separate maintenance; and this without deducting the amount she may have made by her own services after the separation.[317] She may also recover for her mental anguish,

[307] Calcraft *v.* Earl of Harborough, 4 C. & P. 499.

[308] Sanborn *v.* Neilson, 4 N. H. 501.

[309] Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650; Modisett *v.* McPike, 74 Mo. 636.

The expense of her support should be subtracted from the value of her services. Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

[310] *Alabama:* Long *v.* Booe, 106 Ala. 570, 17 So. 716.

Missouri: Hartpence *v.* Rogers, 143 Mo. 623, 632, 45 S. W. 650.

[311] *Kentucky:* Peck *v.* Taylor, 17 Ky. L. Rep. 1312, 34 S. W. 705.

New York: Millspaugh *v.* Potter, 62 App. Div. 521, 71 N. Y. Supp. 134.

[312] Millspaugh *v.* Potter, 62 App. Div. 521, 71 N. Y. Supp. 134.

[313] McNamara *v.* McAllister (Ia.), 130 N. W. 26.

[314] Allen *v.* Besecker, 55 Misc. 366, 105 N. Y. Supp. 416.

[315] *Kentucky:* Scott *v.* O'Brien, 129 Ky. 1, 110 S. W. 260.

Michigan: Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833.

New York: Wilson *v.* Coulter, 29 App. Div. 85, 51 N. Y. Supp. 804.

[316] Bailey *v.* Bailey, 94 Iowa, 598, 606, 63 N. W. 341. It was also held in this case that she cannot show the defendant's wealth.

[317] Bowersox *v.* Bowersox, 115 Mich. 24, 72 N. W. 986.

mortification, and wounded feelings.[318] It may be shown in mitigation that the plaintiff did not love her husband or desire his affection,[319] or that she married him only because he was rich.[320] Her unfaithfulness to him may also be shown in mitigation, as it indicates that she did not feel affection for him.[321]

[318] *Kentucky:* Scott *v.* O'Brien, 129 Ky. 1, 110 S. W. 260.
Michigan: Rice *v.* Rice, 104 Mich. 371, 381, 62 N. W. 833.

[319] *California:* Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.
New York: Van Olinda *v.* Hall, 88 Hun, 452, 34 N. Y. Supp. 777.

[320] Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

[321] Wolf *v.* Frank, 92 Md. 138, 145, 48 Atl. 132.

CHAPTER XX

PERSONAL INJURY

§ 481. General rule.
482. Loss of time.
482a. Loss of business.
483. Medical expenses.
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487. Mitigation.
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489a. Aggravation.
490. Circumstances of the parties.
491. Avoidable consequences.

§ 481. General rule.

We now proceed to consider another class of cases, namely, actions for personal injuries. And here, too, though malice is not the gist of the action, the circumstances of the injury have much bearing upon the amount of loss, and matters of aggravation and mitigation become important. In actions for personal injury, therefore, much latitude is necessarily given the jury. The Supreme Court of California, in enlarging upon the sound and familiar rule that courts will not disturb the verdict in cases of personal tort, unless it is obviously not the result of cool and dispassionate deliberation, broadly declares that in such actions "the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiassed judgment of the jury." [1]

[1] Aldrich *v.* Palmer, 24 Cal. 513.

All the authorities are to the same effect:

Alabama: Southern Ry. *v.* McGowan, 149 Ala. 440, 43 So. 378.

Arkansas: Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

California: Scally *v.* W. T. Garratt & Co. (Cal. App.), 104 Pac. 325.

Illinois: Scott *v.* Hamilton, 71 Ill. 126.

Indiana: Little *v.* Tingle, 26 Ind. 168.

Kansas: Salina M. & E. Co. *v.* Hoyne, 10 Kan. App. 579, 63 Pac. 660.

So the Supreme Court of the United States say that in these actions "there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." [2] The damages are not, however, wholly at large, but must be controlled by the evidence.[3] The price at which one would voluntarily undergo pain and disfigurement is not the measure of recovery for such injury.[4] The damages for a personal injury in cases of simple trespass free from malice, or of simple negligence (where the rule seems to be the same), should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medical and other expenses, physical pain and mental distress, as are fairly and reasonably the plain consequences to him of the injury.[5] Where the health of the plaintiff, already impaired,

Maine: Wadsworth *v.* Treat, 43 Me. 163.

Massachusetts: Coffin *v.* Coffin, 4 Mass. 1; Com. *v.* Sessions of Norfolk, 5 Mass. 435.

Mississippi: Bell *v.* Gulf & C. R. R., 76 Miss. 71, 23 So. 268.

In Ackerson *v.* Erie R. R., 32 N. J. L. 254, it was suggested that for permanent injury the jury might multiply the annual loss by the probable duration of life; but this mathematical method was held improper in Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

[2] *United States:* Illinois C. R. R. *v.* Barron, 5 Wall. 90, 105, 18 L. ed. 591, per Nelson, J.

Louisiana: Armstrong *v.* Jackson, 37 La. Ann. 219.

Rhode Island: McGowan *v.* Interstate Consolidated St. R. R., 20 R. I. 264, 30 Atl. 497.

Virginia: Richmond R. & E. Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220.

[3] *Georgia:* Davis *v.* Central R. R., 60 Ga. 329.

Iowa: Johnson *v.* Tillson, 36 Ia. 89.

Vermont: Drown *v.* New England Tel. & Tel. Co., 81 Vt. 358, 70 Atl. 599.

Plaintiff should recover the present cash value of the injury. Coley *v.* North Carolina R. R., 128 N. C. 534, 542, 39 S. E. 43.

[4] *Kansas:* Union P. Ry. *v.* Milliken, 8 Kan. 647, per Brewer, J.

Pennsylvania: Dooner *v.* Delaware & H. C. Co., 164 Pa. 17, 30 Atl. 269; Willis *v.* Second Ave. Traction Co., 189 Pa. 430, 43 Atl. 1.

But while there can be no market value for pain and suffering, nor can damages be given from a sentimental or benevolent standpoint, the jury must find such reasonable sum as is a fair compensation for the injury. Schenkel *v.* Pittsburg & B. Tr. Co., 194 Pa. 182, 44 Atl. 1072.

[5] *United States:* Wade *v.* Leroy, 20 How. 34, 15 L. ed. 813; Vicksburg & M. R. R. *v.* Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. 1; Hanson *v.* Fowle, 1 Sawy. 539; Bowas *v.* Pioneer Tow Line, 2 Sawy. 21; Potts *v.* Chicago C. Ry., 33 Fed. 610; Saldana *v.* Galveston, H. & S. A. Ry., 43 Fed. 862.

Alabama: South & N. A. R. R. *v.* McLendon, 63 Ala. 266.

Arkansas: St. Louis, I. M. & S. R. R. *v.* Cantrell, 37 Ark. 519.

Colorado: Wall *v.* Cameron, 6 Colo. 275; Wall *v.* Livezay, 6 Colo. 465.

was further injured by the defendant, the measure of damages is compensation for the additional impairment of health, and for obstruction to recovery.[6] For any assault the plaintiff

Delaware: Wallace *v.* Wilmington & N. R. R., 8 Houst. 529, 18 Atl. 818.

Hawaii: Coffin *v.* Spencer, 2 Hawaii, 23.

Illinois: Peoria Bridge Association *v.* Loomis, 20 Ill. 235; Pierce *v.* Millay, 44 Ill. 189; Chicago & A. R. R. *v.* Wilson, 63 Ill. 167; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Elzeman, 71 Ill. 131; Sheridan *v.* Hibbard, 119 Ill. 307.

Indiana: Indianapolis *v.* Gaston, 58 Ind. 224.

Iowa: Lucas *v.* Flinn, 35 Ia. 9; Muldowney *v.* Illinois C. Ry., 36 Ia. 462; McKinley *v.* Chicago & N. W. Ry., 44 Ia. 314; Morris *v.* Chicago, B. & Q. R. R., 45 Ia. 29; Stafford *v.* Oskaloosa, 64 Ia. 251.

Kansas: Tefft *v.* Wilcox, 6 Kan. 46; Kansas P. Ry. *v.* Pointer, 9 Kan. 620; Missouri, K. & T. Ry. *v.* Weaver, 16 Kan. 456 (*semble*).

Kentucky: Central P. Ry. *v.* Kuhn, 86 Ky. 578; Carson *v.* Singleton, 65 S. W. 821, 23 Ky. L. Rep. 1626; Beavers *v.* Bowen, 80 S. W. 1165, 26 Ky. L. Rep. 291.

Louisiana: Donnell *v.* Sandford, 11 La. Ann. 645.

Maine: Mason *v.* Ellsworth, 32 Me. 271; Blackman *v.* Gardiner & P. Bridge, 75 Me. 214.

Maryland: Bannon *v.* Baltimore & O. R. R., 24 Md. 108.

Michigan: Huizega *v.* Cutler & S. Lumber Co., 51 Mich. 272; Power *v.* Harlow, 57 Mich. 107; Sherwood *v.* Chicago & W. M. Ry., 82 Mich. 374, 46 N. W. 773.

Mississippi: Memphis & C. R. R. *v.* Whitfield, 44 Miss. 466.

Missouri: West *v.* Forrest, 22 Mo. 344; Russell *v.* Columbia, 74 Mo. 480; Steiner *v.* Moran, 2 Mo. App. 47.

Nebraska: Chicago, B. & Q. R. R. *v.* Starmer, 26 Neb. 630.

Nevada: Quigley *v.* Central P. R. R., 11 Nev. 350; Cohen *v.* Eureka & P. R. R., 14 Nev. 376.

New York: Ransom *v.* New York & E. Ry., 15 N. Y. 415; Morse *v.* Auburn & S. Ry., 10 Barb. 621; Quinn *v.* Long Island R. R., 34 Hun, 331; Rown *v.* Christopher & T. S. R. R., 34 Hun, 471; Harding *v.* New York, L. E. & W. R. R., 36 Hun, 72; Keyes *v.* Devlin, 3 E. D. Smith, 518; Brignoli *v.* Chicago & G. E. R. R., 4 Daly, 182.

Oregon: Oliver *v.* North P. T. Co., 3 Ore. 84.

Pennsylvania: Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290; Scott *v.* Montgomery, 95 Pa. 444.

Texas: Houston & T. C. Ry. *v.* Boehm, 57 Tex. 152.

Utah: Giblin *v.* McIntyre, 2 Utah, 384.

Virginia: Daingerfield *v.* Thompson, 33 Gratt. 136.

West Virginia: Wilson *v.* Wheeling, 19 W. Va. 323; Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870.

Wisconsin: Goodno *v.* Oshkosh, 28 Wis. 300; Stewart *v.* Ripon, 38 Wis. 584; Hulehan *v.* Green Bay, W. & S. P. R. R., 68 Wis. 520; King *v.* Oshkosh, 75 Wis. 517.

England: Phillips *v.* Southwestern Ry., 4 Q. B. D. 406.

But in Beach *v.* Hancock, 27 N. H. 223, 59 Am. Dec. 373, the jury were told to consider the effect of trivial damages in an action for assault and battery in encouraging disregard of law and disturbance of the public peace.

[6] *Georgia:* Bray *v.* Latham, 81 Ga. 640.

Plaintiff suffered two successive in-

may recover at least nominal damages,[7] but no more than nominal damages, if in fact there was no damage.[8]

§ 482. Loss of time.

Plaintiff who suffers a loss of time by reason of a personal injury may recover the value of the time lost.[9] It is often said that the plaintiff may recover for his loss of wages or of employment,[10] which is certainly much the same thing as

juries by the same defendant. Having already recovered damages for the first, which included damages for permanent injury, she now claimed damages from the second accident, including permanent injury to her earning power. It was held that she could not recover in the second action for anything that was caused by the first injury, but might recover where old injuries were increased or aggravated by the second accident. She cannot recover for disability to carry on profession where she has already recovered for such disability in the first action. If she was disabled in some other way and so incapacitated from doing something else that she could have done before the second and subsequent to the first accident, she might recover for that in the action for the second. Brooks *v.* Rochester Ry., 156 N. Y. 244, 50 N. E. 945.

[7] *Ante*, § 98.

[8] Shaffer *v.* Austin, 68 Kan. 234, 74 Pac. 1118.

[9] *Alabama:* Birmingham R. L. & P. Co. *v.* Wright, 153 Ala. 99, 44 So. 1037; Alabama Steel & Wire Co. *v.* Tallant, 165 Ala. 521, 51 So. 835.

Arkansas: St. Louis, I. M. & S. R. R. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Dunbar *v.* Cowger, 68 Ark. 444, 59 S. W. 951.

Delaware: File *v.* Wilmington City Ry., 80 Atl. 623; Coyle *v.* People's Ry., 80 Atl. 638.

Indiana: Cox *v.* Vanderkleed, 21 Ind. 164; Linton C. & M. Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 211; Evansville H. & S. Co. *v.* Bailey, 43 Ind. App. 153, 84 N. E. 549; Whiteley M. C. Co. *v.* Wishon, 42 Ind. App. 517, 85 N. E. 832; Singer S. N. Co. *v.* Phipps (Ind. App.), 94 N. E. 793.

Iowa: Martin *v.* Murphy, 85 Ia. 669, 52 N. W. 662; Haden *v.* Sioux City & P. R. R., 92 Ia. 226, 60 N. W. 537.

Kentucky: Cross *v.* Illinois C. R. R., 33 Ky. L. Rep. 432, 110 S. W. 290; Louisville & N. R. R. *v.* Crow, 118 S. W. 365; Georgetown *v.* Groff, 136 Ky. 662, 124 S. W. 888; West Ky. C. Co. *v.* Davis, 138 Ky. 667, 128 S. W. 1074.

Missouri: Happy *v.* Prichard, 111 Mo. App. 6, 85 S. W. 655.

New Mexico: Schmidt *v.* Southwestern Brewery & Ice Co., 107 Pac. 677.

North Carolina: McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Oregon: Jones *v.* Peterson, 44 Ore. 161, 74 Pac. 661.

Pennsylvania: Goodhart *v.* Pennsylvania R. R., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

Texas: Houston E. Co. *v.* Seegar (Tex. Civ. App.), 117 S. W. 900.

[10] *Delaware:* Hendle *v.* Geiler, 50 Atl. 632; Heinel *v.* People's Ry., 6 Pennew. 428, 67 Atl. 173; Walls *v.* People's Ry., 80 Atl. 355; Tobias *v.* People's Ry., 80 Atl. 358.

Kentucky: Cincinnati, N. O. & T. P. Ry. *v.* Fortner, 113 S. W. 847.

Michigan: Abbott *v.* Detroit, 150 Mich. 245, 113 N. W. 1121.

Pennsylvania: Hawes *v.* O'Rielly, 126 Pa. 440, 17 Atl. 642.

loss of time; but, as was said by the Supreme Court of Massachusetts, "the wages which the plaintiff might have earned, if not injured, are not strictly recoverable; the value of his time, while prevented from working by reason of the negligence of the defendant, is a proper element to be considered in fixing the damages." [11]

In order to show the value of time lost plaintiff may show what plaintiff's trade or profession was, and the value of his services therein.[12] For that purpose the compensation he was receiving at the time of the injury may be shown.[13] If he has a trade the wages of which are greater than those he was receiving at the time of the accident, this may be proved as bearing on the value of his time; [14] but not matters having a remote bearing only, such as a political office held several years before,[15] or wages paid at a distant city.[16]

Where the butler of a London club brought his action against an architect employed to make repairs on the club-house, and his agents, and averred that they put in gas so negligently that it exploded, and crippled the plaintiff for life, and he was discharged for incapacity to perform the duties of his place, it was insisted for the plaintiff that the measure of damages was the amount of money which would be required to purchase an annuity for the plaintiff equal to the sum which he

[11] Sibley *v.* Nason, 196 Mass. 125, 81 N. E. 887.

[12] *Michigan:* Welch *v.* Ware, 32 Mich. 77.

Missouri: Griveaud *v.* St. Louis Cable & W. Ry., 33 Mo. App. 458, 466.

[13] *California:* Bonneau *v.* North Shore R. R., 152 Cal. 406, 93 Pac. 106.

Connecticut: Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670.

Georgia: Broyles *v.* Prosock, 97 Ga. 643, 25 S. E. 389.

Illinois: Wabash Western Ry. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 ib. 1111; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734.

Missouri: Paul *v.* Omaha & S. L. Ry., 82 Mo. App. 500.

Oklahoma: Chicago, R. I. & P. Ry. *v.* Stibbs, 17 Okla. 97, 87 Pac. 293.

So he may prove a contract of employment, though not yet entered upon. Dunbar *v.* Cowger, 68 Ark. 444, 59 S. W. 951.

[14] *United States:* Northern Pac. Ry. *v.* Wendel, 156 Fed. 336, 84 C. C. A. 232.

Michigan: Sias *v.* Reed City, 103 Mich. 312, 61 N. W. 502.

Texas: Chicago, R. I. & T. Ry. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

[15] Houston & T. C. R. R. *v.* Gee, 27 Tex. Civ. App. 414, 66 S. W. 78.

[16] Omaha & R. V. R. R. *v.* Ryburn, 40 Neb. 87, 58 N. W. 541; Omaha & R. V. Ry. *v.* Chollette, 41 Neb. 578, 592, 59 N. W. 921.

was receiving from the club; but Lord Abinger ruled otherwise; and after commenting on the fact that neither party was in actual fault, said: "If it be asked that the jury are to give damages equal to an annuity, it may be demanded, what right has the plaintiff to calculate that he would have continued in office to the end of his life? I think it would be absurd to make the value of the annuity the measure of damages."[17] The plaintiff can recover the expense of hiring labor while unable to perform work which he, when well, performed himself,[18] but the expenses of living cannot be included in the damages in addition to the value of the plaintiff's time.[19]

§ 482a. Loss of business.

When a man engaged in business is injured, he is of course entitled to compensation for his loss of time resulting from the injury; and the nature and extent of his business may be shown as bearing on the value of his time.[20] If the injury caused not only loss of time, but also loss of profits of the business, this might be shown in a proper case.[21] This point is distinctly held in Hanover Railroad *v.* Coyle.[22] The plaintiff in that case was a peddler, and on the trial below offered to prove the nature and character of his business, the extent of his loss of time, also of the percentage on the goods sold by him in his usual course of business and the loss of interest

[17] Rapson *v.* Cubitt, 1 Car. & M. 64.

[18] *Connecticut:* Ashcraft *v.* Chapman, 38 Conn. 230.

Illinois: North Chicago St. R. R. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157, 78 Ill. App. 463.

Iowa: Kendall *v.* Albia, 73 Iowa, 241, 34 N. W. 833.

Pennsylvania: Willis *v.* Second Ave. Tr. Co., 189 Pa. 430, 43 Atl. 1.

[19] Graeber *v.* Derwin, 43 Cal. 495.

[20] *United States:* Nebraska *v.* Campbell, 2 Black, 590, 17 L. ed. 271.

California: Union D. & Ry. *v.* Londoner, 114 Pac. 316.

Kansas: Chicago, R. I. & P. Ry. *v.* Scheinkoenig, 62 Kan. 57, 61 Pac. 414.

Michigan: Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

Pennsylvania: McLean *v.* Pittsburg Railways, 230 Pa. 291, 79 Atl. 237.

[21] *California:* Castino *v.* Ritzman, 156 Cal. 587, 105 Pac. 739.

Pennsylvania: Wallace *v.* Pennsylvania R. R., 195 Pa. 127, 45 Atl. 685.

Wisconsin: Kinney *v.* Crocker, 18 Wis. 74.

But see *Missouri:* Paquin *v.* St. Louis & S. Ry., 90 Mo. App. 118, 128.

In Haas *v.* St. Louis & S. F. R. R., 128 Mo. App. 79, 106 S. W. 599, where plaintiff was paid a fixed salary and also a percentage on his sales, he was confined in his recovery to the loss of his fixed salary.

[22] 55 Pa. 396.

of money received for the same, in consequence of the injuries received, and the annual amount of sales made by him. The evidence was admitted against the objection of the defendant, who excepted. On error it was held by the Supreme Court that the evidence had been correctly admitted as bearing directly upon the question of damages, in affording a means of computing the plaintiff's loss for the time he was confined by his injuries, and prevented from carrying on his business. Of course, when damages are claimed for loss of business, and no proof is offered of the value of the business, no damages on that account can be given.[23]

Recovery can be had for loss of profits only when the profits were the result of the personal exertions of the injured person, not where they were the result of invested capital or of the good will of an established business; and evidence of the profits of the plaintiff's business can be given only when it is shown that such profits were the result of his personal efforts. The character of the business or occupation and of the income derived therefrom must determine the admissibility of such evidence in this class of actions. If the asserted loss consists of profits which are essentially the uncertain and fluctuating increment of invested capital, proof thereof is inadmissible, no matter how small it may be; and, conversely, if the loss is due to the destruction or impairment of one's personal earning capacity, the evidence thereof is not to be excluded simply because it may be large.[24] Where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from the returns upon capital invested, the income or profits from a business should not be considered[25] in deter-

[23] *Missouri:* Mannerberg *v.* Metropolitan St. Ry., 62 Mo. App. 563.

New Jersey: Mason *v.* Erie R. R., 75 N. J. Law, 521, 68 Atl. 105.

New York: Klein *v.* Second Avenue R. R., 54 N. Y. Super. Ct. 164.

[24] Gombert *v.* New York C. & H. R. R. R., 195 N. Y. 273, 88 N. E. 382.

[25] *United States:* Chicago, R. I. & P. Ry. *v.* Hale, 186 Fed. 626.

California: Lombardi *v.* California St. Ry., 124 Cal. 311, 57 Pac. 66.

Michigan: Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

Missouri: Pryor *v.* Metropolitan St. R. R., 85 Mo. App. 367.

New York: Weir *v.* Union Ry., 188 N. Y. 416, 81 N. E. 168; Gombert *v.* New York C. & H. R. R. R., 195 N. Y. 273, 88 N. E. 382.

mining the amount of the damages to which the plaintiff is entitled. But where the investment of capital is insignificant, and a mere incident to the performance of personal services, recovery may be had for the loss of business earnings.[26] This general subject has been discussed at length in a previous chapter.[27]

§ 483. Medical expenses.

The medical expenses, including the cost of medicine and nursing, may always be recovered,[28] including such future expenses as can be proved with reasonable certainty.[29] The expenses may be recovered though they have not yet been

[26] *Colorado:* Rio Grande Western Ry. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76 (physician).

Georgia: Macon Ry. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569 (dentist).

Iowa: Escher *v.* Carroll County, 146 Ia. 738, 125 N. W. 810 (farmer).

New Jersey: Schwartz *v.* North Jersey St. Ry., 66 N. J. Law, 437, 49 Atl. 676 (builder).

New York: Masterton *v.* Mt. Vernon, 58 N. Y. 391 (tea merchant); Kronold *v.* New York, 186 N. Y. 40, 78 N. E. 572 (importer of laces); Fraser *v.* Buffalo, 123 App. Div. 159, 108 N. Y. Supp. 127 (tailor).

[27] *Ante,* §§ 180, 181.

[28] *United States:* Beardsley *v.* Swann, 4 McLean, 333.

Alabama: Alabama Great Southern R. R. *v.* Siniard, 123 Ala. 557, 26 So. 689.

Arkansas: St. Louis, I. M. & S. R. R. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105.

Delaware: Heidelbaugh *v.* People's Ry., 6 Pennew. 209, 65 Atl. 587; Tobias *v.* People's Ry., 80 Atl. 358; File *v.* Wilmington C. Ry., 80 Atl. 623; Ewans *v.* Wilmington C. Ry., 80 Atl. 634; Coyle *v.* People's Ry., 80 Atl. 638.

Indiana: Cox *v.* Vanderkleed, 21 Ind. 164.

Iowa: Martin *v.* Murphy, 85 Ia. 669, 52 N. W. 662.

Kentucky: Cross *v.* Illinois C. R. R., 33 Ky. L. Rep. 432, 110 S. W. 290; Louisville & N. R. R. *v.* Crow, 118 S. W. 365.

Massachusetts: McGarrahan *v.* New York, N. H. & H. R. R., 171 Mass. 211, 50 N. E. 610.

Michigan: Sherwood *v.* Chicago & W. M. Ry., 82 Mich. 374, 46 N. W. 773.

Missouri: Happy *v.* Prichard, 111 Mo. App. 6, 85 S. W. 655.

New Hampshire: Emery *v.* Boston & M. R. R., 67 N. H. 434, 36 Atl. 367.

New York: Metcalf *v.* Baker, 57 N. Y. 662; Sheehan *v.* Edgar, 58 N. Y. 631; Feeney *v.* Long Island R. R., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

North Carolina: Rushing *v.* Seaboard A. L. Ry., 149 N. C. 158, 62 S. E. 890.

Pennsylvania: Hayes *v.* O'Reilly, 126 Pa. 440, 17 Atl. 642.

[29] *Illinois:* Chicago C. Ry. *v.* Henry, 218 Ill. 92, 75 N. E. 758.

Pennsylvania: Baker *v.* Hagey, 177 Pa. 128, 35 Atl. 705, 55 Am. St. Rep. 712; Amos *v.* Delaware R. F. Co., 228 Pa. 362, 77 Atl. 12.

Washington: Webster *v.* Seattle R. & S. Ry., 42 Wash. 364, 85 Pac. 2.

paid, at least if the plaintiff has become liable for them.[30] But it is not enough to show the amount paid for medical expenses; it must also appear that the amount is a reasonable one.[31] If the plaintiff's living expenses were increased by the injury and the medical treatment, he may recover the amount of such increase.[32] The amount reasonably paid for going to a distant city for special medical treatment may be recovered.[33] Medical expenses may be recovered, though not specially named in the declaration.[34]

The authorities are in conflict as to whether the jury may find a value for medical services, the nature of them having been shown, without affirmative evidence of such value.[35] In many cases the jury are allowed to find the value of such services on their general knowledge,[36] while in other cases this power is denied.[37]

[30] *United States:* Denver & R. G. R. R. *v.* Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

Alabama: Lunsford *v.* Walker, 93 Ala. 36, 8 So. 386.

California: Donnelly *v.* Hufschmidt, 79 Cal. 74.

Illinois: Chicago & E. R. R. *v.* Cleminger, 178 Ill. 536, 53 N. E. 320; Mueller *v.* Kuhn, 59 Ill. App. 353; Chicago & Alton R. R. *v.* Harrington, 77 Ill. App. 499; Wilson *v.* Chicago C. Ry., 144 Ill. App. 604.

Kansas: Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715; Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 46 Pac. 715.

Missouri: Wilbur *v.* Southwest M. E. Ry., 110 Mo. App. 689, 85 S. W. 671.

Nebraska: Friend *v.* Ingersoll, 39 Neb. 717, 58 N. W. 281; Omaha St. Ry. *v.* Emminger, 57 Neb. 240, 77 N. W. 675.

South Carolina: Parker *v.* South Carolina & G. R. R., 48 S. C. 364, 382, 26 S. E. 669.

Utah: Wilson *v.* Southern Pacific Co., 13 Utah, 352, 360, 44 Pac. 1040, 57 Am. St. Rep. 766.

[31] *Nebraska:* Golder *v.* Lund, 50 Neb. 867, 70 N. W. 379.

New York: Gumb *v.* 23d St. Ry., 114 N. Y. 411, 21 N. E. 993; Meade *v.* Goldman, 129 N. Y. Supp. 899.

[32] *California:* Irrgang *v.* Ott, 9 Cal. App. 440, 99 Pac. 528.

Massachusetts: McGarrahan *v.* New York & N. H. R. R., 171 Mass. 211, 50 N. E. 610.

[33] *Michigan:* Sherwood *v.* Chicago & W. M. Ry., 82 Mich. 374, 46 N. W. 773.

Oklahoma: Ayers *v.* Macoughtry, 117 Pac. 1088 (Pasteur treatment).

South Carolina: Hart *v.* Charlotte, C. & A. R. R., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794 (trip to healing springs).

[34] Folsom *v.* Underhill, 36 Vt. 580.

[35] *Ante*, § 171*a*.

[36] *Illinois:* Chicago & E. R. R. *v.* Holland, 122 Ill. 461, 13 N. E. 145.

Massachusetts: McGarrahan *v.* New York & N. H. R. R., 171 Mass. 211, 50 N. E. 610.

New York: Feeney *v.* Long Island R. R., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544. (See Gumb *v.* 23d St. R. R., 114 N. Y. 411, 21 N. E. 993).

[37] *Missouri:* Duke *v.* Missouri Pac. R. R., 99 Mo. 347, 12 S. W. 636.

By the better view the plaintiff may recover compensation for physician's or nurses' services even though such services were rendered gratuitously,[38] or for any other reason the plaintiff is not legally bound to pay for them.[39]

§ 484. Mental and physical suffering.

The plaintiff may recover for all suffering, both mental and physical, which results from the injury.[40] Future suffering

Nebraska: Friend *v.* Ingersoll, 39 Neb. 717, 727, 58 N. W. 281.

Pennsylvania: Brown *v.* White, 202 Pa. 297, 51 Atl. 962.

Texas: Fry *v.* Hillan (Tex. Civ. App.), 37 S. W. 359.

[38] Dean *v.* Wabash R. R., 229 Mo. 425, 129 S. W. 953.

Ante, § 67.

[39] So where the surgeon's bill is outlawed by the statute of limitations the plaintiff may recover the amount of it; he cannot be required to set up the statute of limitations for defendant's benefit, as a bar to an honest debt. Mueller *v.* Kuhn, 59 Ill. App. 353. But see *ante,* § 483, note 50.

[40] *United States:* Peterson *v.* Roessler & H. C. Co., 131 Fed. 156.

Alabama: Louisville & N. R. R. *v.* Binion, 107 Ala. 645, 18 So. 75; Alabama G. S. R. R. *v.* Bailey, 112 Ala. 167, 177, 20 So. 313; Birmingham R. L. & P. Co. *v.* Wright, 153 Ala. 99, 44 So. 1037.

Arkansas: St. Louis, etc., R. R. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105.

California: Zibbell *v.* Southern Pac. Co., 116 Pac. 513.

Delaware: Hendle *v.* Geiler, 50 Atl. 632; Heidelbaugh *v.* People's Ry., 6 Pennew. 209, 65 Atl. 587; Reiss *v.* Wilmington City Ry. — Pennew. —, 67 Atl. 153; Walls *v.* People's Ry., 80 Atl. 355; Tobias *v.* People's Ry., 80 Atl. 358; File *v.* Wilmington C. Ry., 80 Atl. 623; Ewans *v.* Wilmington C. Ry., 80 Atl. 634; Coyle *v.* People's Ry., 80 Atl. 638.

Illinois: Chicago, B. & Q. R. R. *v.* Warner, 108 Ill. 538; Mueller *v.* Kuhn, 59 Ill. App. 353.

Indiana: Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96; Elkhart *v.* Ritter, 66 Ind. 136; Evansville H. & S. Co. *v.* Bailey, 43 Ind. App. 153, 84 N. E. 549.

Iowa: Martin *v.* Murphy, 85 Iowa, 669, 52 N. W. 662.

Kansas: Ft. Scott, W. & W. Ry. *v.* Lightburn, 9 Kan. App. 642, 58 Pac. 1033.

Kentucky: Faulkner *v.* Davis, 18 Ky. L. Rep. 1004, 38 S. W. 1049; Dorris *v.* Warford, 100 S. W. 312, 20 Ky. L. Rep. 963, 9 L. R. A. (N. S.) 1090; Cross *v.* Illinois C. R. R., 33 Ky. L. Rep. 432, 110 S. W. 290; Louisville & N. R. R. *v.* Crow, — Ky. L. Rep. —, 118 S. W. 365; West Ky. C. Co. *v.* Davis, 138 Ky. 667, 128 S. W. 1074.

Louisiana: Donnell *v.* Sandford, 11 La. Ann. 645.

Maryland: Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242; Zell *v.* Dunaway, 80 Atl. 215.

Michigan: Sherwood *v.* Chicago & W. M. Ry., 82 Mich. 374, 46 N. W. 773.

Mississippi: Hollinshed *v.* Yazoo & M. V. R. R., 55 So. 40.

Missouri: Stuppy *v.* Hof, 82 Mo. App. 272; Happy *v.* Prichard, 111 Mo. App. 6, 85 S. W. 655; Diel *v.* Ferguson (Mo. App.), 138 S. W. 545.

Montana: Hosty *v.* Moulton Water Co., 39 Mont. 310, 102 Pac. 568.

New Hampshire: Cooper *v.* Hopkins, 70 N. H. 271, 279, 46 Atl. 100.

New York: Caldwell *v.* Central Park, etc., R. R., 7 Misc. 67, 27 N. Y. Supp. 397, 57 N. Y. St. 489.

is to be considered.[41] Where a surgeon is sued for malpractice compensation is not to be recovered for the whole amount of suffering, but only such additional suffering as was caused by the malpractice.[42] Where a man who was suffering from hernia was wrongfully expelled from a railroad train, it was held that the fact of his hernia might be shown, though no aggravation of his injury was proved; for it tended to show increased mental suffering.[43] Thomas J., said:

"The conductor put the plaintiff in fear by compelling him to accept the alternative of jumping from the platform or being pushed off in the dark, while the train was moving very fast, as it appeared to the plaintiff, and his fear must naturally have been greatly intensified by reason of his physical condition; and it was proper to put the jury in possession of all the facts relating to his physical condition, for the purpose of ascertaining the extent of his mental suffering as a element of damage."

Recovery may be had for any kind of physical or mental suffering, as has already been seen in a previous chapter.[44] So compensation may be recovered for insult and indignity,[45]

North Carolina: McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354; Rushing *v.* Seaboard A. L. Ry., 149 N. C. 158, 62 S. E. 890.

Pennsylvania: Goodhart *v.* Pennsylvania R. R., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; Foote *v.* American Product Co., 201 Pa. 510, 51 Atl. 364.

Texas: Gulf W. T. & P. Ry. *v.* Holzheuser (Tex. Civ. App.), 45 S. W. 188; Kirby Lumber Co. *v.* Lloyd (Tex. Civ. App.), 126 S. W. 319.

[41] *Delaware:* Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187; Heinel *v.* People's Ry., 6 Pennew. 428, 67 Atl. 173.

Illinois: Chicago & M. E. Ry. *v.* Ullrich, 213 Ill. 170, 72 N. E. 815; Chicago City Ry. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087.

Iowa: Fry *v.* Dubuque & S. W. R. R., 45 Ia. 416.

Kentucky: Georgetown *v.* Groff, 136 Ky. 662, 124 S. W. 888.

Michigan: Langworthy *v.* Green, 88 Mich. 207, 50 N. W. 130; Howell *v.* Lansing E. Ry., 136 Mich. 432, 99 N. W. 406.

Missouri: Maguire *v.* Transit Co., 103 Mo. App. 459, 78 S. W. 838.

New York: Aaron *v.* Second Ave. R. R., 2 Daly, 127.

Oregon: Smitson *v.* Southern Pacific Co., 37 Ore. 74, 60 Pac. 907.

Texas: Houston Electric Co. *v.* Seegar, 117 S. W. 900.

Washington: Gallamore *v.* Olympia, 34 Wash. 379, 75 Pac. 978.

Wisconsin: Stewart *v.* Ripon, 38 Wis. 584; Stutz *v.* Chicago & N. W. Ry., 73 Wis. 147, 40 N. W. 653; Heddles *v.* Chicago & N. W. Ry., 77 Wis. 228, 46 N. W. 115.

[42] Wenger *v.* Calder, 78 Ill. 275.

[43] Fell *v.* Northern P. R. R., 44 Fed. 248.

[44] *Ante,* §§ 41, 44.

[45] *Illinois:* Von Reeden *v.* Evans, 52 Ill. App. 209.

for sense of shame and humiliation,[46] for mortification and distress caused by disfigurement,[47] for apprehension of future disease or suffering,[48] and for similar feelings.[49] But the suffering must be real, not imaginary or the result of over-sensitive or over-refined feelings.[50]

§ 485. Impairment of physical capacity.

Compensation should be given for permanent disability or loss of capacity for labor.[51] Since the recovery is for a future

Kentucky: Faulkner *v.* Davis, 18 Ky. L. Rep. 1004, 38 S. W. 1049.

[46] *California:* Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315.

Illinois: Von Reeden *v.* Evans, 52 Ill. App. 209.

Indiana: Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009; Singer S. M. Co. *v.* Phipps (Ind. App.), 94 N. E. 793.

Louisiana: Carrick *v.* Joachim, 126 La. 5, 52 So. 173.

Texas: Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

Washington: Caldwell *v.* Northern Pac. Ry., 56 Wash. 223, 105 Pac. 625.

Wisconsin: Schmitt *v.* Milwaukee St. Ry., 89 Wis. 195, 61 N. W. 834.

[47] *Indiana:* American Strawboard Co. *v.* Foust, 12 Ind. App. 421, 431, 39 N. E. 891.

Pennsylvania: Rockwell *v.* Eldred, 7 Pa. Super. Ct. 95.

Washington: Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206.

Wisconsin: Heddles *v.* Chicago & N. W. Ry., 77 Wis. 228, 46 N. W. 115.

Contra, United States: Chicago R. I. & P. Ry. *v.* Caulfield, 63 Fed. 396, 11 C. C. A. 552.

Illinois: Chicago City Ry. *v.* Mauger, 105 Ill. App. 579.

[48] *New Hampshire:* Walker *v.* Boston & M. R. R., 71 N. H. 271, 51 Atl. 918 (apprehension of insanity).

But see *Illinois:* Illinois Cent. R. R. *v.* Cole, 165 Ill. 334, 46 N. E. 275.

So of apprehension of hydrophobia from the bite of a dog:

Ohio: Heintz *v.* Caldwell, 16 Ohio C. Ct. 630.

Vermont: Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

See *Texas:* Trinity & S. Ry. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

[49] *District of Columbia:* Washington T. Co. *v.* Downey, 26 App. D. C. 258 (shock).

Indiana: Kline *v.* Kline, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397 (fright); Louisville & N. R. R. *v.* Williams, 20 Ind. App. 576, 588, 51 N. E. 128 (peril).

Washington: Cole *v.* Seattle R. & S. Ry., 42 Wash. 462, 85 Pac. 3 (impairment of mental faculties).

[50] *Ante,* § 46*a*.

Thus no recovery can be had for regret at inability to work. Linn *v.* Duquesne, 204 Pa. 551, 54 Atl. 341.

Nor for loss of enjoyment of the pleasures of life. Locke *v.* International & G. N. Ry., 25 Tex. Civ. App. 145, 60 S. W. 314.

Nor for mere inconvenience. Jensen *v.* Chicago, S. P. M. & O. Ry., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

Except such as is actual physical inconvenience, so that it may be comprehended in the term physical discomfort or physical suffering. Texas Tr. Co. *v.* Hanson (Tex. Civ. App.), 124 S. W. 494.

[51] *United States:* Vicksburg & M. R. R. *v.* Putnam, 118 U. S. 545, 30 L. ed.

loss, allowance must be made for the fact that the plaintiff will receive his damages before he would, if uninjured, have

257, 7 Sup. Ct. 1; Potts *v.* Chicago C. Ry., 33 Fed. 610; Campbell *v.* Pullman P. C. Co., 42 Fed. 484.

Alabama: South & N. A. R. R. *v.* McLendon, 63 Ala. 266; Mobile & O. R. R. *v.* George, 94 Ala. 199, 10 So. 145.

Arkansas: Cameron *v.* Vandegriff, 53 Ark. 381, 13 S. W. 1092.

California: Zibbell *v.* Southern Pac. Co., 116 Pac. 513.

Delaware: Wallace *v.* Wilmington & N. R. R., 1 Marv. 25, 8 Houst. 529, 18 Atl. 818; Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187; Heidelbaugh *v.* People's Ry., 6 Pennew. 209, 65 Atl. 587; Heinel *v.* People's Ry., 6 Pennew. 428, 67 Atl. 173; Walls *v.* People's Ry., 80 Atl. 355; Tobias *v.* People's Ry., 80 Atl. 358; File *v.* Wilmington C. Ry., 80 Atl. 623; Ewans *v.* Wilmington C. Ry., 80 Atl. 634; Coyle *v.* People's Ry., 80 Atl. 638.

District of Columbia: Washington & G. R. R. *v.* Patterson, 9 D. C. App. 423, 436.

Illinois: Frink *v.* Schroyer, 18 Ill. 416; Pierce *v.* Millay, 44 Ill. 189; Chicago *v.* Langlass, 52 Ill. 256, 66 Ill. 361; Toledo, W. & W. Ry. *v.* Baddeley, 54 Ill. 19; Chicago & A. R. R. *v.* Wilson, 63 Ill. 167; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Elzeman, 71 Ill. 131; Chicago, B. & Q. R. R. *v.* Warner, 108 Ill. 538; Sheridan *v.* Hibbard, 119 Ill. 307.

Indiana: Indianapolis *v.* Gaston, 58 Ind. 224; Evansville H. & S. Co. *v.* Bailey, 43 Ind. App. 153, 84 N. E. 549; Holcomb *v.* Norman (Ind. App.), 91 N. E. 625.

Iowa: McKinley *v.* Chicago & N. W. Ry., 44 Ia. 314; Morris *v.* Chicago, B. & Q. R. R., 45 Ia. 29; Stafford *v.* Oskaloosa, 64 Ia. 251; Knapp *v.* Sioux City & P. Ry., 71 Ia. 41.

Kansas: Tefft *v.* Wilcox, 6 Kan. 46; Kansas P. Ry. *v.* Pointer, 9 Kan. 620; Missouri, K. & T. Ry. *v.* Weaver, 16 Kan. 456 (*semble*).

Kentucky: Central P. Ry. *v.* Kuhn, 86 Ky. 578; Dorris *v.* Warford, 124 Ky. 768, 100 S. W. 312, 20 Ky. Law Rep. 963, 9 L. R. A. (N. S.) 1090; Cross *v.* Ill. Cent. R. R., 110 S. W. 290, 33 Ky. L. Rep. 432; West K. C. Co. *v.* Davis, 138 Ky. 667, 128 S. W. 1074.

Louisiana: Donnell *v.* Sandford, 11 La. Ann. 645.

Maine: Blackman *v.* Gardiner & P. Bridge, 75 Me. 214.

Maryland: McMahon *v.* Northern C. Ry., 39 Md. 438; Zell *v.* Dunaway, 80 Atl. 215.

Massachusetts: McGarrahan *v.* New York, N. H. & H. R. R., 171 Mass. 211, 50 N. E. 610.

Michigan: Geveke *v.* Grand Rapids & I. R. R., 57 Mich. 589, 24 N. W. 675; Sherwood *v.* Chicago & N. W. Ry., 82 Mich. 374, 46 N. W. 773; Abbott *v.* Detroit, 150 Mich. 245, 113 N. W. 1121.

Mississippi: Memphis & C. R. R. *v.* Whitfield, 44 Miss. 466.

Missouri: Whalen *v.* St. Louis, K. C. & N. Ry., 60 Mo. 323; Ridenhour *v.* Kansas City C. Ry., 102 Mo. 270, 13 S. W. 889; Steiner *v.* Moran, 2 Mo. App. 47; McNeill *v.* Cape Girardeau, 153 Mo. App. 424, 134 S. W. 582; Diel *v.* Ferguson (Mo. App.), 138 S. W. 545.

Nebraska: Chicago, B. & Q. R. R. *v.* Starmer, 26 Neb. 630.

Nevada: Cohen *v.* Eureka & P. R. R., 14 Nev. 376.

New Hampshire: Holyoke *v.* Grand T. Ry., 48 N. H. 541.

New York: Filer *v.* New York C. R. R., 49 N. Y. 42.

North Carolina: Rushing *v.* Seaboard A. L. Ry., 149 N. C. 158, 62 S. E. 290.

Oregon: Oliver *v.* North P. T. Co., 3 Ore. 84.

earned the money for which they stand; in other words, he is entitled not to the entire amount which he has been prevented from earning, but the present worth of such amount.[52] So in Fuls me *v.* Concord,[53] it was held correct to instruct the jury that in estimating the plaintiff's prospective damages they should reduce his losses to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future by the injuries. In actions for personal injury where the basis of damages is the reduced capacity to earn money, it is error to instruct the jury to give the plaintiff a sum which put at interest will produce annually a sum equal to the difference between what he could earn before and after the injury. They should be instructed to give an amount which would purchase an annuity equal to the difference during the probable life of the plaintiff, calculated upon a reliable estimate of the average duration of human life.[54] In estimating this amount, life

Pennsylvania: Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290; Pittsburg, A. & M. P. Ry. *v.* Donahue, 70 Pa. 119; Scott *v.* Montgomery, 95 Pa. 444; Willis *v.* Second Ave. Traction Co., 189 Pa. 430, 42 Atl. 1.

Texas: Houston & T. C. R. R. *v.* Willie, 53 Tex. 318; Houston & T. C. Ry. *v.* Boehm, 57 Tex. 152; Gulf, W. T. & P. Ry. *v.* Holzheuser (Tex. Civ. App.), 45 S. W. 188; Kirby Lumber Co. *v.* Lloyd, 126 S. W. 319 (Tex. Civ. App.).

Utah: Giblin *v.* McIntyre, 2 Utah, 384.

Vermont: Lincoln *v.* Central Vermont Ry., 82 Vt. 187, 72 Atl. 821.

Wisconsin: Weisenberg *v.* Appleton, 26 Wis. 56; Goodno *v.* Oshkosh, 28 Wis. 300; Hulehan *v.* Green Bay, W. & S. P. R. R., 68 Wis. 520; King *v.* Oshkosh, 75 Wis. 517.

England: Phillips *v.* Southwestern Ry., 4 Q. B. D. 406; Fair *v.* London & N. W. Ry., 21 L. T. Rep. 326.

To give damages for loss of time and in addition for impairment of earning capacity is not to give double damages, since the former recovery applies to the period during which the plaintiff was totally incapacitated by the injury, and the latter to the permanent impairment of capacity after recovery from the immediate injury.

Colorado: Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Iowa: Haden *v.* Sioux C. & P. R. R., 92 Ia. 226, 60 N. W. 537.

[52] *United States:* Peterson *v.* Chemical Co., 131 Fed. 156.

Iowa: Williams *v.* Clarke County, 143 Ia. 328, 120 N. W. 306; Greenway *v.* Taylor County, 144 Ia. 332, 122 N. W. 943.

New York: Gregory *v.* New York, L. E. & W. Ry., 55 Hun, 303, 8 N. Y. Supp. 525; Morrison *v.* Long Island R. R., 3 App. Div. 205, 38 N. Y. Supp. 393.

Pennsylvania: Wilkinson *v.* Northeast Borough, 215 Pa. 486, 64 Atl. 734.

[53] 46 Vt. 135.

[54] *United States:* Baltimore & O. R. R. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623.

Montana: Bourke *v.* Butte Electric

tables may be used,[55] but are not conclusive; [56] and other evidence of the probable duration of life may be introduced.[57] Damages for permanent deformity, resulting from an injury, may be allowed; though, it has been said, not the expenses of surgical operations undertaken after the wound is healed, for the purpose of removing the blemish.[58] So compensation may be had for lost usefulness and enjoyment of life,[59] and for loss of capacity to have offspring.[60]

§ 485a. Amount of loss by physical impairment.

In ascertaining the proper amount in case of disability, the jury may take into consideration the nature of the plaintiff's previous occupation,[61] and the kind and amount of physical

& P. Co., 33 Mont. 267, 83 Pac. 470; Moyse *v.* Northern Pac. Ry., 41 Mont. 272, 108 Pac. 1062.

Texas: Houston & T. C. R. R. *v.* Willie, 53 Tex. 318.

[55] *United States:* Vicksburg & M. R. R. *v.* Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. 1.

Alabama: Birmingham Ry., L. & P. Co. *v.* Wright, 153 Ala. 99, 44 So. 1037.

Indiana: Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512.

Iowa: Knapp *v.* Sioux City & P. Ry., 71 Ia. 41.

[56] Robinson *v.* Helena L. & Ry. Co., 38 Mont. 222, 99 Pac. 837.

[57] *Maine:* Haynes *v.* Waterville & O. St. Ry., 101 Me. 335, 64 Atl. 614.

Wisconsin: Waterman *v.* Chicago & A. R. R., 82 Wis. 613, 52 N. W. 247.

[58] *United States:* The Oriflamme, 3 Sawy. 397.

California: Karr *v.* Parks, 44 Cal. 46.

[59] Haynes *v.* Waterville & O. St. Ry., 101 Me. 335, 64 Atl. 614.

Damages may be recovered for impairment of the power of speech. Garbaczewski *v.* Third Ave. R. R., 5 App. Div. 186, 39 N. Y. Supp. 33.

But not, it has been held, for the shortening of life. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 609, 45 N. E. 1049, 36 L. R. A. 683.

And in Kentucky it has been said that no compensation can be had for permanent impairment of health, in addition to impairment of physical powers. Georgetown *v.* Groff, 136 Ky. 662, 124 S. W. 888.

[60] *Illinois:* Postal T. C. Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136.

New York: Devine *v.* Brooklyn H. R. R., 131 App. Div. 142, 115 N. Y. Supp. 263.

See *ante*, § 41*a*.

[61] *United States:* Nebraska City *v.* Campbell, 2 Black, 590, 17 L. ed. 271; Southern Pac. R. R. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

Alabama: Alabama G. S. R. R. *v.* Yarborough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715.

California: Shaw *v.* Southern Pac. R. R., 157 Cal. 240, 107 Pac. 108; Zibbell *v.* Southern Pac. Co., 116 Pac. 513.

Colorado: Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Indiana: Elkhart *v.* Ritter, 66 Ind. 136; Linton Coal & M. Co. *v.* Persons, 11 Ind. App. 264, 273, 38 N. E. 214.

Iowa: Moore *v.* Central R. R., 47 Ia. 688.

Missouri: Batten *v.* Transit Co., 102 Mo. App. 285, 76 S. W. 727.

New York: Caldwell *v.* Murphy, 11 N. Y. 416.

North Carolina: Wilkie *v.* Raleigh & C. F. R. R., 127 N. C. 203, 37 S. E. 204.

Pennsylvania: Goodhart *v.* Pennsyl-

and mental labor to which he has been accustomed.[62] For that purpose the previous earnings of the plaintiff may be shown, as compared with his earnings in his present condition.[63] Any particular aptitude, talent, or training which the plaintiff possessed may also be shown,[64] and the plaintiff is not confined to the employment in which he was actually

vania R. R., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; McKenna *v.* Citizens' Natural Gas Co., 201 Pa. 146, 50 Atl. 922.

Vermont: Nones *v.* Northouse, 46 Vt. 587.

Wisconsin: Ripon *v.* Bittel, 30 Wis. 614.

The income derived from an illegal employment cannot be shown. Murray *v.* Interurban St. Ry., 118 App. Div. 35, 102 N. Y. Supp. 1026.

[62] Ballou *v.* Farnum, 11 All. (Mass.) 73.

If there is no evidence of the pecuniary value of such services, the plaintiff is entitled to at least nominal damages for a permanent injury. Sloss-Sheffield S. & I. Co. *v.* Stewart (Ala), 55 So. 785.

[63] *United States:* Parshall *v.* Minneapolis & S. L. Ry., 35 Fed. 649; Illinois Cent. R. R. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306.

Alabama: Seaboard Mfg. Co. *v.* Woodson, 94 Ala. 143, 11 So. 733; Elba *v.* Bulard, 152 Ala. 237, 44 So. 412.

California: Bonneau *v.* North Shore R. R., 152 Cal. 406, 93 Pac. 106.

Illinois: Chicago & E. R. R. *v.* Meech, 163 Ill. 305, 45 N. E. 290; Chicago U. Tr. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287.

Indiana: Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653.

Massachusetts: Murdock *v.* New York & B. D. E. Co., 167 Mass. 549, 46 N. E. 57.

Michigan: Welch *v.* Ware, 32 Mich. 77; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572; Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Minnesota: Palmer *v.* Winona R. & L. Co., 78 Minn. 138, 80 N. W. 869, 83 Minn. 85, 85 N. W. 941.

Ohio: Mt. Adams & E. P. I. Ry. *v.* Isaacs, 18 Ohio C. Ct. 177.

In the absence of evidence to the contrary, the wages actually obtained by the plaintiff after the injury will be taken as the highest he could reasonably obtain. Roth *v.* Buettel Bros. Co., 142 Ia. 212, 119 N. W. 166.

See, however, Mt. Adams & E. P. I. Ry. *v.* Isaacs, 18 Oh. C. Ct. 177.

[64] *California:* Doolin *v.* Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060 (ability to play musical instruments and sing); Scally *v.* W. T. Garratt & Co., 9 Cal. App. 194, 104 Pac. 325 (musical talent and ability to play violin).

New Jersey: Rhinesmith *v.* Erie R. R., 76 N. J. Law, 783, 72 Atl. 15 (well-trained voice).

In District of Columbia *v.* Woodbury, 136 U. S. 450, 459, 10 Sup. Ct. 990, 993, 34 L. ed. 472, it was held that plaintiff may show that he, being a medical man, had in the past written for medical journals upon various medical subjects, and that since the injury he had not been able to do so. This shows the serious and permanent character of the injuries received by him, and that his capacity to pursue his studies was impaired, in spite of the fact that it did not appear that the plaintiff had derived any income from these contributions. He was entitled to recover for this impairment though his contributions were made without compensation.

engaged at the time of the injury. He may recover compensation based upon what he could have earned in any employment for which he was fitted,[65] or was in process of becoming fitted.[66] So a person retired from business at the time of the injury may recover compensation based upon what he might have earned in business;[67] and one who happened to be idle or at work in a less lucrative trade at the time of the injury may show his earnings before the time of the injury in a more lucrative trade.[68] Other circumstances which tend to establish the amount of loss may be shown;[69] but the loss of special opportunities will not ordinarily be either proximate or certain enough for recovery.[70]

Certain personal qualities or habits of the plaintiff may be shown, so far as they have a bearing on the actual amount

[65] *California:* Zibbell *v.* Southern Pac. Co., 116 Pac. 513.

Texas: Pecos & N. T. Ry. *v.* Blasengame (Tex. Civ. App.), 93 S. W. 187.

[66] Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665.

[67] *Illinois:* Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598.

Texas: El Paso Electric Ry. *v.* Murphy, 49 Tex. Civ. App. 586, 109 S. W. 489.

[68] *Illinois:* West Chicago St. Ry. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586.

Texas: Missouri, K. & T. Ry. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Chicago, R. I. & T. Ry. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

Washington: Peterson *v.* Seattle Traction Co., 23 Wash. 615, 643, 63 Pac. 539.

Plaintiff cannot show his earnings many years before in a special position quite different from his present employment. Chicago & J. E. R. R. *v.* Spence, 213 Ill. 220, 72 N. E. 796.

Where there is no evidence that plaintiff could have obtained or exercised any other employment than that in which he was engaged at the time of the injury, his earnings in that employment alone will be taken as the measure of his loss. O'Connor *v.* Chicago, R. I. & P. Ry., 144 Ia. 289, 117 N. W. 979.

[69] *Alabama:* Helton *v.* Alabama Midland R. R., 97 Ala. 275, 12 So. 276 (plaintiff being disabled from manual labor may show that he has not sufficient education to earn money in a clerical calling).

Illinois: Hamilton *v.* Pittsburgh, C. C. & S. L. Ry., 104 Ill. App. 207 (defendant may show that by the use of an artificial leg plaintiff will be able to earn money).

Michigan: Ostrander *v.* Lansing, 115 Mich. 224, 73 N. W. 110 (defendant may not show that by reason of the injury plaintiff may be compelled to educate himself, and will then be able to secure a better income than before).

[70] *Georgia:* Richmond & D. R. R. *v.* Allison, 86 Ga. 145, 12 S. E. 352 (probability of promotion to a higher political office).

Illinois: Chicago & E. R. R. *v.* Meech, 163 Ill. 305, 45 N. E. 290 (particular contract of employment).

Massachusetts: Brown *v.* Cummings, 7 Allen, 507 (application for position of surgeon's mate).

of his loss; as that one of his hands was previously crippled;[71] or that he was a tramp.[72] So evidence of the plaintiff's habitual drunkenness, incapacitating him for labor, is proper in reference to the amount of the compensatory damages he should receive for a permanent disability.[73] But matters which have no bearing on the actual amount of loss cannot be shown.[74]

§ 486. Recovery by married woman.

Where the suit is by a married woman, her loss of time is no part of the injury for which compensation can be given. Her time and services belong to the husband, and for a loss of them he must sue alone.[75] And for the same reason she cannot recover the amount of medical expenses, unless actually paid out of her separate estate.[76] She may recover compensa-

[71] Townsend *v.* Briggs, 99 Cal. 481, 32 Pac. 307, 34 Pac. 116.

[72] Central of Georgia Ry. *v.* Moore, 5 Ga. App. 562, 63 S. E. 642.

[73] Cleveland & P. R. R. *v.* Sutherland, 19 Oh. St. 151.

[74] *Alabama:* Louisville & N. R. R. *v.* Woods, 115 Ala. 527, 22 So. 33 (amount plaintiff had been able to save from his wages).

Michigan: Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572 (that plaintiff had no means of support except by his own exertions).

[75] *Illinois:* Joliet *v.* Conway, 119 Ill. 489, 10 N. E. 223.

Indiana: Ohio & M. Ry. *v.* Cosby, 107 Ind. 32.

Iowa: Thomas *v.* Brooklyn, 58 Ia. 438, 10 N. W. 849; Hall *v.* Manson, 90 Ia. 585, 58 N. W. 881; Frohs *v.* Dubuque, 109 Ia. 219, 80 N. W. 341.

Kansas: Holton *v.* Hicks, 9 Kan. App. 179, 58 Pac. 998.

Massachusetts: Jordan *v.* Middlesex R. R., 138 Mass. 425.

Michigan: Tunnicliffe *v.* Bay Cities C. Ry., 102 Mich. 624, 61 N. W. 11.

Missouri: Plummer *v.* Milan, 70 Mo. App. 598; Wallis *v.* Westport, 82 Mo. App. 522.

New Jersey: Klein *v.* Jewett, 26 N. J. Eq. 474.

Wisconsin: Barnes *v.* Martin, 15 Wis. 240.

Therefore it is error to instruct the jury that the damages under statutes giving an action for causing death, are the same in the case of a married and an unmarried woman. An unmarried woman is entitled to her whole earnings. The time of a married woman is not exclusively her own, but a portion of it must be devoted to the care of the family and aiding her husband. Stulmuller *v.* Cloughly, 58 Ia. 738.

[76] *Connecticut:* Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237.

Delaware: Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

Georgia: Lewis *v.* Atlanta, 77 Ga. 756.

Indiana: Ohio & M. Ry. *v.* Cosby, 107 Ind. 32.

Massachusetts: Jordan *v.* Middlesex R. R., 138 Mass. 425.

Michigan: Cousins *v.* Lake Shore & M. S. Ry., 96 Mich. 386, 56 N. W. 14; Rogers *v.* Orion, 116 Mich. 324, 74 N. W. 463.

Minnesota: Belyea *v.* Minneapolis, S. P. & S. S. M. Ry., 61 Minn. 224, 63 N. W. 627.

New Jersey: Klein *v.* Jewett, 26 N. J. Eq. 474.

tion for her pain and suffering,[77] and for inability to perform services personal to herself, such as dressing and eating.[78] It has also been held that she may recover for permanent impairment of her earning capacity.[79]

Under the married women's property acts, now passed in almost every jurisdiction, the case is different. Under these acts her domestic services are still performed on her husband's account, but if she performs other services for hire, the proceeds are her own; and if she carries on business on her own account, she is entitled to the profits. Consequently, if she was in fact carrying on business for herself at the time of the injury, or was in fact earning money on her own account, she may recover compensation for the loss of capacity to earn money as she had been doing,[80] which must not include any compensation for loss of ability to do housework or perform ordinary domestic services, since that is still her husband's loss.[81] In some jurisdictions she is allowed to recover com-

New York: Burnham *v.* Webster, 54 N. Y. Super. Ct. 30; Moody *v.* Osgood, 50 Barb. 628.

[77] *United States:* Green *v.* Pennsylvania R. R., 36 Fed. 66.

Connecticut: Tompkins *v.* West, 56 Conn. 478.

Delaware: Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

District of Columbia: Johnson *v.* Baltimore & P. R. R., 17 D. C. (6 Mack.) 232.

Indiana: Ohio & M. Ry. *v.* Cosby, 107 Ind. 32.

Massachusetts: Jordan *v.* Middlesex R. R., 138 Mass. 425.

New Jersey: Klein *v.* Jewett, 26 N. J. Eq. 474.

Texas: Missouri Pac. Ry. *v.* Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066.

Washington: Hawkins *v.* Front St. Cable Ry., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808.

So she may recover compensation for being marred in her personal appearance. Chicago & M. E. Ry. *v.* Krempel, 103 Ill. App. 1.

[78] *District of Columbia:* Johnson *v.* Baltimore & P. R. R., 17 D. C. (6 Mack.) 232.

Illinois: Chicago & M. E. Ry. *v.* Krempel, 103 Ill. App. 1.

[79] *Delaware:* Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

Georgia: Southern Ry. *v.* Hutcheson, 71 S. E. 802.

Indiana: Ohio & M. Ry. *v.* Cosby, 107 Ind. 32.

Massachusetts: Jordan *v.* Middlesex R. R., 138 Mass. 425.

[80] *United States:* Texas & P. Ry. *v.* Humble, 97 Fed. 837, 38 C. C. A. 502.

Missouri: Nelson *v.* Metropolitan St. Ry., 113 Mo. App. 659, 88 S. W. 781.

Montana: Hamilton *v.* Woodworth Ry., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

New Jersey: Healey *v.* Ballentine, 66 N. J. L. 339, 49 Atl. 511.

New York: Brooks *v.* Schwerin, 54 N. Y. 343; Minick *v.* Troy, 19 Hun, 253; Blaechinska *v.* Howard Mission, etc., 56 Hun, 322, 9 N. Y. Supp. 679.

[81] Hall *v.* Manson, 90 Iowa, 585, 58 N. W. 881.

pensation for the impairment of her ability to earn money, outside of her domestic service, even if she has never engaged in any gainful occupation, since she is entitled to do so;[82] but in other jurisdictions the right to recover is confined to cases where she was actually earning money at the time of the injury.[83] Since under these statutes she has power to contract, she may make a valid agreement to pay for medical services and expenses; and if she does so, she may recover the amount for which she is liable.[84]

§ 486a. Husband's action for injury to wife.

In an action by a husband for the loss of his wife's services through the defendant's fault, he may recover the value of her services which he has lost.[85] This includes not only the

[82] *Kentucky:* Louisville & N. R. R. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831.

Massachusetts: Harmon *v.* Old Colony R. R., 165 Mass. 104, 105, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499; Millmore *v.* Boston Elevated Ry., 198 Mass. 370, 84 N. E. 468.

[83] *Missouri:* Kroner *v.* Transit Co., 107 Mo. App. 41, 80 S. W. 915; Becker *v.* Lincoln R. E. & B. Co., 118 Mo. App. 74, 93 S. W. 291.

New York: Uransky *v.* Dry Dock, E. B. & B. R. R., 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759.

Virginia: Richmond R. & E. Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

Even where she was employed and paid by her husband as a sempstress, it was held that she could not recover for impairment of her earning capacity, as if she had been working for a stranger, since she could not make a valid contract with her husband for payment for such services. Blacchinska *v.* Howard Mission, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

[84] *Alabama:* Southern R. R. *v.* Crowder, 135 Ala. 427, 33 So. 335; Elba *v.* Bullard, 152 Ala. 237, 44 So. 412.

Illinois: Mueller *v.* Kuhn, 59 Ill. App. 353.

Indiana: Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687.

Michigan: Lucas *v.* Detroit City Ry., 92 Mich. 412, 52 N. W. 745.

Nebraska: Struble *v.* De Witt, 132 N. W. 124.

North Dakota: Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932.

Oklahoma: Willet *v.* Johnson, 13 Okla. 563, 76 Pac. 174.

[85] *Alabama:* Alabama C. G. & A. Ry. *v.* Appleton, 54 So. 638.

Colorado: Union Pac. Ry. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Connecticut: Comstock *v.* Connecticut R. & L. Co., 77 Conn. 65, 58 Atl. 465.

District of Columbia: Washington & G. R. R. *v.* Hickey, 12 D. C. App. 269.

Indiana: Citizens' S. Ry. *v.* Twiname, 121 Ind. 375, 23 N. E. 159.

Nebraska: Riley *v.* Lidtke, 49 Neb. 139, 68 N. W. 356.

North Carolina: Kimberly *v.* Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545.

Pennsylvania: Henry *v.* Klopfer, 147 Pa. 178, 23 Atl. 337; Hewitt *v.* Pennsylvania R. R., 228 Pa. 397, 77 Atl. 623.

ordinary domestic services, but also the comfort of her society and companionship, and her capacity for usefulness, aid and comfort as a wife,[86] and her parental care for his children.[87] Even under the married women's property acts the husband may recover for the value of her domestic services and her assistance in his business, as well as the loss of her society.[88] No special evidence need be offered as to the value of such services, which the jury may find on their own knowledge.[89] But in such an action it is proper to admit evidence of what the plaintiff had paid a third person to do the work his wife usually performed.[90] The husband may recover the medical expenses of his wife's illness.[91] So, also, he can recover something for his own services in attending on her;[92] but only the amount which such services are worth in nursing, not the value

Wisconsin: Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

Canada: Fox *v.* Saint John, 23 N. B. 244.

[86] *District of Columbia:* Washington & G. R. R. *v.* Hickey, 12 D. C. App. 269.

Iowa: Hutcheis *v.* Cedar Rapids & M. C. Ry., 128 Iowa, 279, 103 N. W. 779.

Missouri: Furnish *v.* Missouri Pac. R. R., 102 Mo. 669, 22 Am. St. Rep. 800, 15 S. W. 315.

Nebraska: Omaha & R. V. Ry. *v.* Ryburn, 40 Neb. 87, 58 N. W. 541.

Pennsylvania: Hewitt *v.* Pa. R. R., 228 Pa. 397, 77 Atl. 623.

Wisconsin: Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691.

[87] Indianapolis & M. R. T. Co. *v.* Reeder, 42 Ind. App. 520, 85 N. E. 1042.

[88] *Illinois:* Blair *v.* Bloomington & N. R. E. & H. Co., 130 Ill. App. 400.

Nebraska: Omaha & R. V. Ry. *v.* Ryburn, 40 Neb. 87, 58 N. W. 541; Riley *v.* Lidtke, 49 Neb. 139, 68 N. W. 356.

Pennsylvania: Standen *v.* R. R., 214 Pa. 189, 63 Atl. 467.

[89] Ft. Worth & R. H. St. Ry. *v.* Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556.

[90] *Nebraska:* Riley *v.* Lidtke, 49 Neb. 139, 68 N. W. 356.

Vermont: Lindsey *v.* Danville, 46 Vt. 144.

But he cannot recover both the value of her services and also the expense of hiring a substitute. Indianapolis & M. R. T. Co. *v.* Reeder, 42 Ind. App. 520, 85 N. E. 1042.

[91] *Alabama:* Alabama C. G. & A. Ry. *v.* Appleton, 54 So. 638.

Colorado: Union Pacific Ry. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Indiana: Indianapolis & M. R. T. Co. *v.* Reeder, 85 Ind. App. 520, 85 N. E. 1042.

Pennsylvania: Henry *v.* Klopfer, 147 Pa. 178, 23 Atl. 337.

But only if he is liable for them. Birmingham R. L. & P. Co. *v.* Humphries, 55 So. 307.

[92] *Alabama:* Louisville & N. R. R. *v.* Quinn, 145 Ala. 657, 39 So. 616.

Missouri: Smith *v.* St. Joseph, 55 Mo. 456.

Texas: Dallas *v.* Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

of his time in his business.[93] The husband cannot recover for his wife's suffering,[94] nor for the loss of her unborn child.[95] Evidence of the pecuniary condition of the plaintiff is inadmissible.[96]

§ 486b. Recovery by minor.

A minor cannot recover for loss of time or earning capacity during his minority, since his earnings during that time belong to his parent;[97] unless he has been emancipated, when his earnings belong to himself and he may therefore recover for loss of time even during minority,[98] or unless his parent waives his right to his earnings.[99] Since the parent is obliged to support the child during minority, and therefore to furnish

[93] *United States:* Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

Colorado: Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810.

Washington: Howells *v.* North American Transportation & T. R. Co., 24 Wash. 689, 64 Pac. 786.

Wisconsin: Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691.

[94] Indianapolis T. & T. Co. *v.* Menze, 173 Ind. 31, 89 N. E. 370.

[95] Butler *v.* Manhattan Ry., 143 N. Y. 417, 37 N. E. 826, 42 Am. St. Rep. 738, 26 L. R. A. 46.

[96] *Texas:* Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. 95.

Wisconsin: Rooney *v.* Milwaukee C. Co., 65 Wis. 397.

[97] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

Georgia: Western & A. R. R. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Atlanta & W. P. R. R. *v.* Smith, 94 Ga. 107, 20 S. E. 763.

Illinois: Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583; Western U. Tel. Co. *v.* Woods, 88 Ill. App. 375; Chicago City Ry. *v.* Schaefer, 121 Ill. App. 334.

Iowa: Wilder *v.* Great Western Cereal Co., 134 Ia. 451, 109 N. W. 789.

Kentucky: Cincinnati, N. O. & T. P. Ry. *v.* Troxell, 137 S. W. 543.

Michigan: Braasch *v.* Michigan Stove Co., 153 Mich. 652, 118 N. W. 366.

New Jersey: Clark Mile-End Spool Cotton Co. *v.* Shaffery, 58 N. J. L. 229, 33 Atl. 284.

Tennessee: Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Texas: Gulf, C. & S. F. Ry. *v.* Evansich, 63 Tex. 54; Texas & P. Ry. *v.* Morin, 66 Tex. 225; Freeman *v.* Mireles (Tex. Civ. App.), 127 S. W. 1162.

Wisconsin: Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

[98] *Georgia:* Atlanta & West Point R. R. *v.* Smith, 94 Ga. 107, 20 S. E. 763 (*semble*).

Illinois: Manufacturers' Fuel Co. *v.* White, 228 Ill. 187, 81 N. E. 841, affirming 130 Ill. App. 29.

[99] *Vermont:* Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96.

Wisconsin: Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374 (*semble*).

In *Washington* it has been held that a parent waives his right to compensation for loss of the minor's time by suing as next friend, and that the minor can therefore recover for it. Donald *v.* Ballard, 34 Wash. 576, 76 Pac. 80; Hammer *v.* Caine, 47 Wash. 475, 92 Pac. 441.

medical attendance, the minor cannot recover medical expenses resulting from the injury,[100] unless, as may happen, the minor's estate has become responsible for them.[101] A minor may however recover compensation for strictly personal loss, such as pain and suffering [102] and disfigurement; [103] and he may also recover in case of any permanent injury compensation for all effects of such injury as will be felt after he becomes of age.[104]

§ 486c. Parent's action for injury to child.

If the parent sues for an injury to his child, the ground of action being the loss of service, the measure of damages is the actual pecuniary loss which the parent has sustained,[105]

[100] *Iowa:* Newbury *v.* Getchel & M. L. & M. Co., 100 Ia. 441, 69 N. W. 743, 62 Am. St. Rep. 582.

Tennessee: Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Texas: Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133.

Wisconsin: Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

[101] *Alabama:* Forbes *v.* Loftin, 50 Ala. 396 (minor emancipated).

Vermont: Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96 (incurred by minor himself and necessary).

[102] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

Delaware: Linthicum *v.* Truitt, 80 Atl. 245.

Kentucky: Cincinnati, N. O. & T. P. Ry. *v.* Troxell, 137 S. W. 543.

Missouri: McMillan *v.* Union P. B. W., 6 Mo. App. 434.

[103] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

Iowa: Newbury *v.* Getchel & M. L. & M. Co., 100 Iowa, 441, 69 N. W. 743, 62 Am. St. Rep. 582.

[104] *United States:* Delaware, L. & W. R. R. *v.* Devore, 114 Fed. 155, 52 C. C. A. 77.

Arkansas: St. Louis, I. M. & S. Ry. *v.* Warren, 65 Ark. 619, 48 S. W. 222.

Delaware: Linthicum *v.* Truitt, 80 Atl. 245.

Kentucky: Cincinnati, N. O. & T. P. Ry. *v.* Troxell, 137 S. W. 543.

Missouri: Rosenkrantz *v.* Lindell Ry., 108 Mo. 9, 18 S. W. 892, 32 Am. St. Rep. 588; McMillan *v.* Union P. B. W., 6 Mo. App. 434. In Brown *v.* St. Louis & S. Ry., 127 Mo. App. 499, 106 S. W. 83, evidence of such loss was held too speculative; but the prevailing view in that State is that the jury may find compensation for such loss even without evidence of its amount. Ferrier *v.* Shoenberg Mercantile Co., 138 S. W. 893; Buckry-Ellis *v.* Missouri Pac. Ry., 138 S. W. 912.

In Western & A. R. R. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320, it was held that the jury should estimate loss of the minor's probable future earnings, having in view his degree of intelligence, and his opportunities to equip himself for the race of life, according to his present condition, in view of the pursuits he might have applied himself to if he had not been injured.

[105] *New York:* Werbolovsky *v.* New York & B. D. E. Co., 63 Misc. 329, 117 N. Y. Supp. 150.

Pennsylvania: Pennsylvania R. R. *v.* Kelly, 31 Pa. 372; Pennsylvania R. R. *v.* Zebe, 33 Pa. 318; Woeckner *v.* Erie E. M. Co., 182 Pa. 182, 37 Atl. 936.

without compensation for loss of society of the child,[106] or for grief of the parent because of the injury,[107] or for loss or inconvenience to other members of the family.[108] In the ordinary case of loss of service through a physical injury to the child or other servant the injuries to the master and to the servant are distinct, and recovery by one of them cannot affect the amount recoverable by the other.[109]

The measure of damages in such cases is compensation for loss of the minor's time,[110] the expenses sustained by the injury, such as those for surgical and medical attendance, and the increased expense of maintaining the child during minority.[111] A parent can recover for the expenses incurred,

Rhode Island: McGarr *v.* National & P. W. Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122.

[106] Werbolovsky *v.* New York & B. D. E. Co., 63 Misc. 329, 117 N. Y. Supp. 150.

[107] *Colorado:* Union Pac. Ry. *v.* Jones, 21 Colo. 340, 347, 40 Pac. 891.

Louisiana: Brinkman *v.* St. Landry C. O. Co., 118 La. 835, 43 So. 458.

Rhode Island: McGarr *v.* National & P. W. Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122.

[108] Woeckner *v.* Erie E. M. Co., 182 Pa. 182, 37 Atl. 936.

[109] *Texas:* Evansich *v.* Gulf, C. & S. F. Ry., 57 Tex. 123.

Vermont: Bradley *v.* Andrews, 51 Vt. 525.

[110] *United States:* Netherland A. S. N. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

Kansas: Sawyer *v.* Sauer, 10 Kan. 519.

Missouri: Buck *v.* People's St. R. E. L. & P. Co., 46 Mo. App. 555, 568.

New York: Cuming *v.* Brooklyn City R. R., 109 N. Y. 95, 16 N. E. 65; Lang *v.* New York, L. E. & W. R. R., 51 Hun, 603; Gilligan *v.* New York & H. R. R., 1 E. D. Smith, 453.

Pennsylvania: Oakland Ry. *v.* Fielding, 48 Pa. 320.

Texas: Houston & G. N. R. R. *v.* Miller, 49 Tex. 322; Texas & P. Ry. *v.* Morin, 66 Tex. 133.

[111] *United States:* Netherland A. S. N. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

Illinois: Seltzer *v.* Saxton, 71 Ill. App. 229.

Louisiana: Brinkman *v.* St. Landry Cotton Oil Co., 118 La. 835, 43 So. 458.

Massachusetts: Keating *v.* Boston El. Ry., 95 N. E. 840.

New York: Barnes *v.* Keene, 132 N. Y. 13, 20 N. E. 1090.

Rhode Island: Galligan *v.* Woonsocket R. R., 27 R. I. 376, 62 Atl. 376.

In Heater *v.* R. R., 90 App. Div. 495, 85 N. Y. Supp. 524, it was said that the father could not recover the amount of the medical expenses without evidence that he was under a legal liability to pay them.

In Cuming *v.* Brooklyn City R. R., 109 N. Y. 95, 16 N. E. 65, it was said that speculative medical or surgical expenses likely to be incurred at some time during the child's minority cannot be recovered, as it is too uncertain whether the parent will be called upon to pay them, since either the child or parent might die or the parent be pecuniarily unable to pay for the services rendered. If anyone can recover for such services it must be the minor himself on the ground that if the money

although the child was too young to render any service.[112] If the parent himself renders services to the child, as, for instance, nursing, beyond what he would have rendered if there had been no injury, he may recover the value of such services.[113] No recovery can be had for the cost of supporting the child during minority, since the parent is bound to do that at any rate.[114]

In addition to these items of loss, the parent is entitled to compensation for the diminished earning capacity of the child during his minority,[115] but not for any loss of support that might have come to the parent after the child became of age.[116] As no allowance is to be made for cost of supporting the child, since the parent must support him during minority at any rate, he is therefore damaged by the entire amount by which the child's earning capacity is diminished.[117] Definite evidence of such diminution in earning power cannot be expected, especially in case of a young child, and need not be produced.[118]

§ 487. Mitigation.

Circumstances which show that the damage was not as

is not obtained for that purpose, it will really be the child who will suffer.

[112] Sykes *v.* Lawlor, 49 Cal. 236.

[113] *Louisiana:* Brinkman *v.* St. Landry C. O. Co., 118 La. 835, 43 So. 458.

Missouri: Schmitz *v.* St. Louis, I. M. & S. Ry., 46 Mo. App. 380.

New Hampshire: Connell *v.* Putnam, 58 N. H. 534.

Rhode Island: Simone *v.* R. I. Co., 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740.

The amount recoverable is the value of the parent's services as nurse, not his loss in his own business by reason of his loss of time in nursing.

Alabama: Woodard Iron Co. *v.* Curl, 153 Ala. 205, 44 So. 974.

New York: Barnes *v.* Keene, 132 N. Y. 12, 29 N. E. 1090; Ceigler *v.* Hopper-Morgan Co., 90 App. Div. 379, 85 N. Y. Supp. 656.

[114] Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

[115] *Illinois:* Seltzer *v.* Saxton, 71 Ill. App. 229.

Iowa: Goodrich *v.* Burlington C. R. & N. Ry., 97 Ia. 521, 66 N. W. 770.

New York: Traver *v.* Eighth Ave. R. R., 3 Keyes, 497.

[116] *New York:* Ceigler *v.* Hopper-Morgan Co., 90 App. Div. 379, 85 N. Y. Supp. 656.

Texas: Pacific Express Co. *v.* Watson (Tex. Civ. App.), 124 S. W. 127.

[117] *Missouri:* Mauerman *v.* St. Louis, I. M. & S. Ry., 41 Mo. App. 348; Schmitz *v.* St. Louis, I. M. & S. Ry., 46 Mo. App. 380.

Rhode Island: Galligan *v.* Woonsocket St. R. R., 27 R. I. 363, 62 Atl. 376.

[118] *Missouri:* Blackwell *v.* Hill, 76 Mo. App. 45, 54.

Nebraska: Vanderveer *v.* Moran, 112 N. W. 581, 79 Neb. 431.

Tennessee: Central Mfg. Co. *v.* Cotton, 108 Tenn. 63, 65 S. W. 403.

great as the evidence of the plaintiff appears to indicate may be introduced in mitigation. This is usually allowed in two cases. Where (as may always happen in cases of personal injury) a part of the damages consists in physical and mental suffering, non-pecuniary damage, circumstances of mitigation may be shown;[119] and where, as often happens in such cases, exemplary damages are allowed, circumstances of mitigation may always be shown.[120] In allowing evidence to be introduced in mitigation the courts are not always careful to state whether compensatory or exemplary damages are in question; and this fact has caused some confusion as to what may be admitted in mitigation. But the safe rule to follow is that any circumstance which tends to qualify the amount of pain, physical or mental, suffered by the plaintiff, may be shown in mitigation of compensatory damages; while any evidence which tends to qualify the malice of the defendant, or his desert to suffer punishment, may be shown in mitigation of exemplary damages.

The fact that parties fought by mutual agreement, or voluntarily engaged in a mutual affray, may be shown to mitigate at least exemplary damages,[121] but has been held not to mitigate compensatory damages.[122] The fact that the plaintiff was the aggressor may be shown to mitigate actual damages,[123] and so may the fact that plaintiff was making a great disturbance on defendant's land, and refused to leave when requested.[124] In an action for an assault and battery, where the altercation grew out of a question of veracity between the parties, the defendant was allowed to show that the *truth* of the matter in dispute was with him, in mitigation of damages.[125] But in an action by a husband and wife for an assault and battery on the wife, previous misconduct of the husband cannot be received in mitigation. Nor, it seems, where the misconduct consisted in fraudulently obtaining pos-

[119] *Ante*, § 51.

[120] *Ante*, §§ 383 *et seq.*

[121] Barholt *v.* Wright, 45 Oh. St. 177.

[122] *Maine:* Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413.

Wisconsin: Shay *v.* Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538.

[123] Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

[124] Robison *v.* Rupert, 23 Pa. 523.

[125] Marker *v.* Miller, 9 Md. 338.

session of premises, and the assault and battery were perpetrated in forcibly turning out the fraudulent occupant, could such fraud be shown in mitigation of any real damages sustained by him. It could be received in mitigation of exemplary damages only, and then only where the fraud or its discovery was very recent and the defendant acted under the consequent excitement of the moment.[126]

The good character of the defendant is not admissible in mitigation of damages.[127]

§ 487a. Provocation.

One of the simplest forms of mitigatory evidence is always provocation. "In actions for personal wrongs and injuries," says Lord Abinger,[128] at Nisi Prius, "a defendant who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff in some degree brought the thing upon himself." This was an action for assault and battery; and it was held that a libel published by the plaintiff on the defendant may be given in evidence in mitigation of damages, even though it be at the time the subject of a cross-action; but that being so, the defendant ought not to derive much advantage from it in mitigating the damages. Provocation may be given in evidence in mitigation of damages, provided it be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[129] In most

[126] Jacobs *v.* Hoover, 9 Minn. 204.

[127] Elliott *v.* Russell, 92 Ind. 526; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

[128] Fraser *v.* Berkeley, 7 C. & P. 621.

[129] *Delaware:* Hendle *v.* Geiler, 50 Atl. 632.

Illinois: Murphy *v.* McGrath, 79 Ill. 594; Chicago & A. R. R. *v.* Randolph, 65 Ill. App. 208.

Iowa: Ireland *v.* Elliott, 5 Ia. 478; Gronan *v.* Kukkuck, 59 Ia. 18, 12 N. W. 748.

Maine: Turner *v.* Footman, 71 Me. 218.

Maryland: Gaither *v.* Blowers, 11 Md. 536; Byers *v.* Horner, 47 Md. 23.

Massachusetts: Tyson *v.* Booth, 100 Mass. 258.

Mississippi: Martin *v.* Minor, 50 Miss. 42.

Missouri: Collins *v.* Todd, 17 Mo. 537.

New York: Corning *v.* Corning, 6 N. Y. 97; Willis *v.* Forrest, 2 Duer, 310.

North Carolina: Johnston *v.* Crawford, 62 N. C. (Phillips) 342; Palmer *v.* Winston-Salem R. & E. Co., 131 N. C. 250, 42 S. E. 604.

South Carolina: Hayes *v.* Sease, 51 S. C. 534, 29 S. E. 259.

of the cases cited it does not appear whether the damages to be mitigated were compensatory or exemplary; but in some jurisdictions evidence of provocation can be shown to mitigate exemplary damages only.[130] So in Cushman *v.* Waddell,[131] which was an action by a schoolmaster against a parent for a severe beating, the court held that no provocation could excuse the defendant from making full compensation for all the injury the plaintiff had suffered by the unlawful attack on his person. But if the jury were satisfied that, without any previous malice towards the plaintiff or any deliberate design to injure him in person or the estimation of the public, he acted in the heat of passion, caused by the appearance and account of his son, it was a circumstance which ought to operate powerfully to reduce the damages to such as were compensatory.

The provocation must be sufficient.[132] Mere words may be proved in mitigation;[133] but words uttered by the plaintiff

Tennessee: Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. 1128.

[130] *Delaware:* Armstrong *v.* Rhoades, 4 Pennew. 151, 53 Atl. 435.

Illinois: Donnelly *v.* Harris, 41 Ill. 126.

Missouri: Burley *v.* Menefee, 129 Mo. App. 518, 108 S. W. 120.

Nebraska: Mangold *v.* Oft, 63 Neb. 397, 88 N. W. 507.

New Jersey: Osler *v.* Walton, 67 N. J. L. 63, 50 Atl. 590.

New York: Genung *v.* Baldwin, 75 App. Div. 195, 77 N. Y. Supp. 679.

Vermont: Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 110, 4 L. R. A. 500, 15 Am. St. Rep. 424.

Wisconsin: Wilson *v.* Young, 31 Wis. 574; Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582; Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468.

In *Pennsylvania*, Robinson *v.* Rupert, 23 Pa. 523, a peculiar distinction is taken; provocation by a third person may mitigate exemplary damages only, but provocation by the plaintiff may mitigate compensatory damages as well.

[131] 1 Bald. 57.

[132] Refusal of plaintiff to return defendant's salutation is not sufficient. Turnbow *v.* Wimberly, 106 La. 259, 30 So. 747.

The more violent and wanton the attack, the greater must be the provocation to mitigate (exemplary) damages.

Illinois: Drohn *v.* Brewer, 77 Ill. 280.

Minnesota: Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

[133] *California:* Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

Delaware: Tatnall *v.* Courtney, 6 Houst. 434; Hendle *v.* Geiler, 50 Atl. 632.

Georgia: Berkner *v.* Danneberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559.

Illinois: Donnelly *v.* Harris, 41 Ill. 126.

Kentucky: Doerhoefer *v.* Shewmaker, 97 S. W. 7, 29 Ky. L. Rep. 1193 (obscene language).

Louisiana: Munday *v.* Landry, 51 La. Ann. 303, 25 So. 66.

Minnesota: Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

against the defendant in the absence of the latter, and reported to him by a third person, are not admissible in mitigation.[134]

§ 488. Bad character of the plaintiff.

The plaintiff's bad character and association with persons of ill repute does not usually palliate an assault, and cannot mitigate the damages.[135] Nor can a person guilty of wilful assault and battery show that, from the intemperate habits of the other party, the injury was more aggravated than it would have been upon a person of temperate habits.[136] Yet evidence of character and habits may be admissible in many cases where it would have a special bearing on the damages claimed.[137] So in an action for assault with intent to ravish, the plaintiff's character for modesty may be shown, since it would have a bearing on the amount of injury to her feelings; [138] and for the same reasons the plaintiff's quarrelsome character may be considered in an action for assault and battery.[139] So it has been held that in an action for personal injuries caused by the defendant's negligence the unchastity of the plaintiff may be considered on the question of her loss of wages for domestic service.[140]

New York: Keyes *v.* Devlin, 3 E. D. Smith, 518; Roades *v.* Larson, 21 N. Y. Supp. 855, 50 N. Y. St. 551.

In a case in Maine it appeared that plaintiff gave provocation for an assault by the use of insulting language, but this was the result of intoxication by liquors furnished plaintiff by the defendant. It was held that defendant could not take advantage of the state of mind which he himself had caused, and while the general rule is that provocation could be shown to mitigate the damages for such an injury, that could not be done in this case. Robichaud *v.* Maheux, 104 Me. 524, 72 Atl. 334.

[134] Jarvis *v.* Manlove, 5 Harr. (Del.) 452.

[135] *Massachusetts:* Bruce *v.* Priest, 5 All. 100.

Nevada: Johnson *v.* Wells, 6 Nev. 224.

New York: Corning *v.* Corning, 6 N. Y. 97.

Texas: Shook *v.* Peters, 59 Tex. 393.

[136] Littlehale *v.* Dix, 11 Cush. (Mass.) 364.

[137] So in Abbott *v.* Tolliver, 71 Wis. 64, 70, 36 N. W. 622, Cole, C. J., said: "The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury."

[138] *Vermont:* Parker *v.* Coture, 63 Vt. 155, 21 Atl. 494, 25 Am. St. Rep. 750.

Wisconsin: Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

[139] Lowe *v.* Ring, 123 Wis. 107, 101 N. W. 381.

[140] Carlton *v.* St. Louis & Suburban Ry., 128 Mo. App. 451, 106 S. W. 1100.

§ 489. Criminal conviction.

Nor can the defendant in a civil action for an assault and battery be permitted to prove in mitigation of damages that he had been indicted, convicted, and fined for the same offence. An indictment is intended as a vindication of public justice; an action is brought for compensation for private injury. The object of the two proceedings is entirely distinct, and the one should not interfere with the course of the other.[141] In Texas, however, the payment of a fine is admissible in mitigation of exemplary damages.[142] And in England the fact that defendant had been convicted on complaint of the plaintiff, who had received part of the fine, could be shown in mitigation.[143]

§ 489a. Aggravation.

Proper evidence may be introduced in aggravation of damages. Thus evidence of the defendant's malice may be given to aggravate damages for assault and battery, since it affects plaintiff's mental suffering.[144] And plaintiff may prove that he was sober and industrious, as affecting his earning power, in an action for personal injury.[145] But where defendant has already been prosecuted criminally for a battery, the fact that only a nominal fine was inflicted and paid will not increase the damages.[146]

§ 490. Circumstances of the parties.

The amount of compensatory damages is not affected by the wealth or poverty of the plaintiff.[147] Nor can he augment damages by proving that he has a wife and several small

[141] *Delaware:* Armstrong *v.* Rhoades, 4 Pennew. 151, 53 Atl. 435.

Illinois: Hanson *v.* Urbana & C. El. St. Ry., 75 Ill. App. 474.

Iowa: Lucas *v.* Flinn, 35 Ia. 9; Reddin *v.* Gates, 52 Ia. 210, 2 N. W. 1079.

Mississippi: Wheatley *v.* Thorn, 23 Miss. 62.

New York: Cook *v.* Ellis, 6 Hill, 466, 41 Am. Dec. 757.

South Carolina: Wolff *v.* Cohen, 8 Rich. L. 144; Edwards *v.* Weissinger, 65 S. C. 161, 43 S. E. 518.

Vermont: Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

[142] Flanagan *v.* Womack, 54 Tex. 45; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

[143] Jacks *v.* Bell, 3 C. & P. 316, 14 E. C. L. 586.

[144] Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688.

[145] Metropolitan St. Ry. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136.

[146] Honaker *v.* Howe, 19 Gratt. (Va.) 50.

[147] *United States:* Alabama G. S. R.

children.[148] And the wealth of the defendant should not be considered in estimating compensatory damages.[149] For this reason the fact that defendant is a rich corporation cannot be considered by the jury. So in Illinois Central Railroad *v.* Nelson,[150] an action for being wrongfully put off a train, it

R. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207.

Alabama: Barbour Co. *v.* Horn, 48 Ala. 566.

California: Shea *v.* R. R., 44 Cal. 414; Malone *v.* Hawley, 46 Cal. 409.

Georgia: Georgia R. & B. Co. *v.* Benton, 117 Ga. 785, 45 S. E. 70.

Kansas: City of Parsons *v.* Lindsay, 26 Kan. 426; Bank of LeRoy *v.* Harding, 1 Kan. App. 389, 41 Pac. 680; Fort Scott, W. & W. Ry. *v.* Lightburn, 9 Kan. App. 642, 58 Pac. 1033.

Missouri: Berryman *v.* Cox, 73 Mo. App. 61.

Texas: Belton *v.* Lockett (Tex. Civ. App.), 57 S. W. 687; Dallas C. E. St. Ry. *v.* Summers, 48 Tex. Civ. App. 474, 106 S. W. 891.

Vermont: Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989.

Wisconsin: Vosberg *v.* Putney, 78 Wis. 84, 47 N. W. 99, 14 L. R. A. 226 (wealth of father of minor plaintiff).

Contra, Illinois: McNamara *v.* King, 7 Ill. 432; Cochran *v.* Ammon, 16 Ill. 316, where Skinner, J., said: "The pain and suffering may be much greater where, from his pecuniary condition, the husband is unable to furnish medical aid, remedies, apartments, and nursing, such as ample means would afford," and therefore the pecuniary condition of the husband "tended to show the extent of the injury to the wife."

Indiana: Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Mississippi: Eltringham *v.* Earhart, 67 Miss. 488, 7 So. 346, 19 Am. St. Rep. 319.

[148] *United States:* Pennsylvania R. R. *v.* Roy, 102 U. S. 451, 26 L. ed. 141; Baltimore & O. R. R. *v.* Camp, 81 Fed. 807, 26 C. C. A. 626; Alabama G. S. R. R. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207.

Alabama: Louisville & N. R. R. *v.* Binion, 107 Ala. 645, 18 So. 75.

Georgia: Georgia R. & B. Co. *v.* Benton, 117 Ga. 785, 45 S. E. 70.

Illinois: Chicago *v.* O'Brennan, 65 Ill. 160; Pittsburg, F. W. & C. Ry. *v.* Powers, 74 Ill. 341 (but see McNamara *v.* King, 7 Ill. 432).

Kansas: Kansas City, F. S. & M. R. R. *v.* Eagan, 64 Kan. 421, 67 Pac. 887; Union Pac. Ry. *v.* Hammerlund, 70 Kan. 888, 79 Pac. 152.

Maryland: Stockton *v.* Frey, 4 Gill, 406, 45 Am. Dec. 138.

Tennessee: Louisville & N. R. R. *v.* Gower, 85 Tenn. 465.

Texas: City of Belton *v.* Lockett (Tex. Civ. App.), 57 S. W. 687.

Virginia: Southern Ry. *v.* Simmons, 105 Va. 651, 55 S. E. 459.

West Virginia: More *v.* Huntington, 31 W. Va. 842, 8 S. E. 512; Sesler *v.* Rolfe Coal & C. Co., 51 W. Va. 318, 41 S. E. 216.

Contra, South Carolina: Youngblood *v.* South Carolina & G. R. R., 60 S. C. 9, 38 S. E. 232.

Australia: Devir *v.* Curley, 3 N. S. W. L. R. 322.

[149] Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96.

But in a few cases, where the damages appear to have been compensatory, the wealth of the defendant was shown:

Illinois: McNamara *v.* King, 7 Ill. 432.

Mississippi: Etringham *v.* Earhart, 67 Miss. 488, 7 So. 346, 19 Am. St. Rep. 319.

[150] 59 Ill. 110.

was held error to charge the jury that they were "not confined to the same amount of damages or the same rules as if the suit was between individuals, as the public have an interest in such cases which may be considered and looked to in assessing the damages." In Toledo, Wabash & Western Railway *v.* Smith [151] it was held to be error to tell the jury that in assessing damages against a company and a conductor, for expelling the plaintiff from the cars, they could consider the ability of the company to pay. And in an action against a town for personal injury to the plaintiff, the assessed value of the town cannot be shown.[152]

Where exemplary damages are permissible, the pecuniary condition of the defendant may be shown,[153] as has been seen in a previous chapter.[154]

§ 491. Avoidable consequences.

The fact that plaintiff might by proper care have avoided part of the consequences of the defendant's tort may, as has already been seen,[155] be shown to limit recovery. So where the plaintiff was injured by a train, but did not employ a physician for a week after the injury, it was held that she was bound to take ordinary care to make the damages as small as possible, and if she did not, she could not recover for the damages resulting.[156] But the failure to obey the orders of his physician does not bar the plaintiff from his action; it simply goes in mitigation.[157]

[151] 57 Ill. 517.

[152] Madigan *v.* Schaghticoke, 128 N. Y. Supp. 800 (App. Div.).

[153] *United States:* Brown *v.* Evans, 8 Sawy. 488, 17 Fed. 912.

Illinois: Alcorn *v.* Mitchell, 63 Ill. 553.

Maryland: Zell *v.* Dunaway, 80 Atl. 215.

Mississippi: Bell *v.* Morrison, 27 Miss. 68.

Missouri: Beck *v.* Dowell, 40 Mo. App. 71; Johnston *v.* Wells, 112 Mo. App. 557, 87 S. W. 70.

Ohio: Hendricks *v.* Fowler, 16 Ohio C. Ct. 597, 9 Ohio Cir. Dec. 209.

South Carolina: Rowe *v.* Moses, 9 Rich. 423, 67 Am. Dec. 560.

If evidence of defendant's wealth is admitted, defendant may in reply introduce evidence of his own poverty to meet it.

Illinois: Mullin *v.* Spangenberg, 112 Ill. 140, 145.

Maine: Johnson *v.* Smith, 64 Me. 553.

[154] *Ante*, § 385.

[155] *Ante*, § 214*a*.

[156] Allender *v.* Chicago, R. I. & P. R. R., 37 Ia. 264.

[157] *New York:* DuBois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429.

Owing to the condition of plaintiff, caused by indulgence in intoxicating liquors, although he was then in good health, the shock of the injury produced delirium tremens, which retarded his recovery. It was held that the general rule, that where injury develops a latent disease the person responsible for the injury is responsible for such disease,[158] applies here, although the tendency was caused by the defendant's voluntary indulgence in liquor.[159]

North Carolina: McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Texas: Trinity & S. Ry. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

[158] *Ante,* § 121*b*.

[159] Maguire *v.* Sheehan, 117 Fed. 819, 54 C. C. A. 642.

CHAPTER XXI

ACTIONS FOR THE CONVERSION OF PERSONAL PROPERTY

§ 492. Forms of action.
492a. The modern action for conversion.
492b. Conversion by demand and refusal.
493. General rule in cases of conversion.
493a. Elasticity of the rule—Reduction of damages.
494. Conversion by temporary wrongful use.
494a. Return and acceptance—Reduction.
494b. Return by order of court.
494c. Property bought back by owner.
495. Value, how determined.
496. Value, where to be estimated.
497. Value, when to be estimated.
497a. Result of following the property.
497b. Recovery by owner of a limited interest.
497c. Conversion of pledged property; action by pledgor.
§ 497d. Action by pledgee.
497e. Conversion of mortgaged property; action by mortgagor.
497f. Action by mortgagee.
497g. Conversion of property sold conditionally.
498. Natural increase.
499. Property increased in value by the defendant.
500. Severance from the freehold.
501. The rule in England.
502. Technical rule followed in some jurisdictions.
503. Defendant generally allowed value of his labor.
504. Damages recoverable from purchaser.
505. Confusion.
506. Consequential and special damages.
506a. Proximate and remote damages.
506b. Avoidable consequences.

§ 492. Forms of action.

* Trover is the form of action prescribed by the common law, where damages are demanded for specific personal property which has been wrongfully appropriated, or, in more technical language, converted to the use of any other than its rightful owner. It was often brought at the option of the plaintiff in cases where assumpsit, and in others where trespass, or replevin, would lie.[1] The consequences flowing from

[1] Barker *v.* Cory, 15 Oh. 9. And so, to-day, facts showing conversion may justify an action of contract. Fifth Nat. Bk. *v.* Providence Warehouse, 17 R. I. 112, 20 Atl. 203, 9 L. R. A. 260; Anderson *v.* First Nat. Bk., 5 N. D. 451, 67 N. W. 821.

the election of assumpsit are well stated in the language of Lord Ellenborough, C. J.:

"In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money, and takes to the net proceeds of the sale as the value of the goods,[2] subject, of course, to all the consequences of considering the demand in question as a *debt*, and, amongst others, to that of the defendants having a right of set-off, if they should happen to have any counter-demand against the plaintiff." [3] **

Assumpsit for money had and received is the proper form of action when the defendant has received money, or what is to be treated as such, to the use of the plaintiff; but it will not lie for stocks, goods, or other articles, unless by the understanding of the parties they were to be treated as money. Accordingly, where the plaintiff sued in this form of action, at a time when gold had risen to a premium, to recover a sum of gold which had been deposited with the sheriff's deputy as bail, the recovery was limited to the value of the gold as money, with interest.[4] But in an action of trover, for the value of certain special deposits in coin, it was held, by the Supreme Court of Missouri, that the measure of damages was the *value* of the coin at the date of its conversion.[5] In Stevens *v.* Low [6] where goods having been sold at an agreed price, to be paid in notes, and delivered conditionally, and the condition being broken, trover was brought for the goods, the court said that if assumpit had been brought, the plaintiff would have been entitled to the *agreed* value; but that in trover the *value* and interest was the true measure, and that the defendant was at liberty to show that the value of the property was much less than the agreed price. And this is in accordance with

[2] DeClerq *v.* Mungin, 46 Ill. 112.

[3] Hunter *v.* Prinsep, 10 East, 378, 391.

[4] Frothingham *v.* Morse, 45 N. H. 545.

[5] Coffey *v.* National Bank of Missouri, 46 Mo. 140, 2 Am. Rep. 488. If plaintiff waives the conversion, and sues in *assumpsit* for money had and received, he can recover only what the defendant actually received. Howell *v.* Greaves, 27 Ark. 365. *Cf.* Murray *v.* Pate, 6 Dana (Ky.), 335; Thomas *v.* Waterman, 7 Met. (Mass.) 227.

[6] 2 Hill (N. Y.), 132.

the analogous cases brought on implied or express warranties of chattels, which will be considered later.

§ 492a. The modern action for conversion.

Any interference or intermeddling with the property of another, or the exercise of dominion over it, in denial of the owner's right, constitutes a conversion, for which an action for the value of the property converted can be maintained.[7] Since by our law a purchaser gets no better title than his vendor had, the plaintiff may recover not only from the original wrongdoer, but from anyone claiming title under him however innocent; *e. g.*, the person who originally committed the wrong or his vendee or an officer attaching and selling at the suit of one having no title, or his vendee.

The transfer of a promissory note by indorsement to a *bona fide* holder, who enforces it against plaintiff (a prior indorser) may involve a conversion, though having been negotiated for a purpose not intended by the first indorser; and the latter may recover the amount he has had to pay.[8]

If the plaintiff has been deprived of property, it will constitute a conversion, though there be no acquisition of property to defendant.[9] Conversion may be either direct or constructive, and may be proved, directly or by inference.[10]

[7] Milner & Kettig Co. *v.* DeLeach Mill. Mfg. Co., 139 Ala. 645, 36 So. 765.

[8] Comstock *v.* Hier, 73 N. Y. 269, 29 Am. Rep. 142.

[9] Keyworth *v.* Hill, 5 E. C. L. 422, 3 B. & Ald. 685 (book burnt by wife, by order of husband).

[10] Every *unlawful taking* with intent to apply the goods to the use of the taker, or of some other persons than the owner, or having the effect of destroying or altering their nature, is a conversion. But if it does not interfere with the owner's dominion over the property, nor alter its condition, it is not. Upon these principles, it has been held that if a ferryman wrongly put the horses of a passenger out of the boat, without farther intent concerning them, it may be a trespass, but it is not a conversion; but if he make any further disposition of them, inconsistent with the owner's rights, it is a conversion. 2 Greenl. Ev., § 642. These are the principles to be deduced from the numerous cases on this subject. If there is no intent to interfere with the owner's dominion of property, there can be no conversion. The bare removing of one's chattel from one spot to another, without denying his ownership, but on the contrary acknowledging it, cannot be a conversion. It is neither a deprivation of the owner's right, nor is it the use, enjoyment, change or destruction of the property:

Alabama: King *v.* Franklin, 132 Ala. 559, 31 So. 467.

Conversion is the gist of the action; and an unqualified refusal after demand is evidence which, combined with proof of title in the plaintiff, is conclusive. The return of the property after conversion is no bar, but is admissible in mitigation of damages. In such a case, of course, the plaintiff recovers the actual damages sustained. Under ordinary circumstances, the defendant cannot compel plaintiff to accept a return, but sometimes, *e. g.*, when the property came lawfully into the defendant's possession, and no actual damages are suffered, the plaintiff recovers only nominal damages for a technical conversion. The term conversion is used in two senses; one denoting the legal cause of action, the other the substantive acts, causing or not causing damage, but still adequate to bring the cause of action into existence.[11] For a purely technical conversion (*i. e.*, where there is a conversion in law but no damage is done), nominal damages only are recoverable. The title does not vest in the defendant until either judgment, or satisfaction of judgment, and if before the title leaves the plaintiff the property is taken from defendant on a writ against the plaintiff, of which he must ultimately have the benefit, nominal damages only can be allowed.[12]

Under the modern system of pleading, a complaint for the conversion of property must, it is said, still contain the *material* allegations necessary in a common-law action of trover. This does not mean that the fictitious allegation of the finding of the property is retained; the gist of the modern action is the unlawful conversion, that is, assumption of ownership, of goods coming lawfully or unlawfully into the defendant's possession. The property must have value, but the value need not be alleged. Damages, however, must be alleged. It is no defence that the conversion was by mistake. There must have been possession, actual or constructive, and there must be some act of dominion (not necessarily manual) in denial of the owner's right or inconsistent with it. Demand and refusal of the property, originally in trover probably indis-

Missouri: Sparks *v.* Purdy, 11 Mo. 219, 225.

[11] Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109.

[12] Jones *v.* Cobb, 84 Me. 153, 24 Atl. 798.

pensable, are evidence of conversion, but the fact of conversion is capable of proof by any adequate evidence. Possession, or the right to it at the time of the conversion, must be alleged. The measure of damages (running from the time of the conversion) is, in the absence of special circumstances, the value of the property or property rights converted, at the time of the conversion, with interest. Special damages may be recovered; if accepted, the return in such a case goes in mitigation of damages.[13] And so, too, if the return and acceptance is by operation of law. A destruction of the property, after conversion, does not affect the measure of damages.[14]

Where defendant knowing another to be mentally incompetent, induces the other by fraud or undue influence to transfer property to him, this is conversion.[15]

Conversion is not trespass and they must be carefully distinguished.[16] Trespass does not necessarily import anything in derogation or denial of title.

After the plaintiff acquires a claim for the amount of money representing the measure of damages involved, the ordinary rate of interest is allowed upon it.[17]

§ 492b. Conversion by demand and refusal.

It frequently happens that the measure of damages in the action for conversion begins to run from the time of demand for the property by the plaintiff and refusal by the defendant, and where there is no actual demand, from the time of judicial demand or suit brought; but it is important to notice that refusal to restore goods on demand is only evidence of the conversion and is not necessary whenever a conversion can

[13] *Colorado:* Sigel-Campion Live Stock Com. Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68.

Indiana: B. L. Blair Co. *v.* Rose, 26 Ind. App. 487, 60 N. E. 10.

Massachusetts: Iasigi *v.* Shea, 148 Mass. 538, 20 N. E. 110.

Montana: Babcock *v.* Coldwell, 22 Mont. 460, 56 Pac. 1081.

New York: Suffus *v.* Bangs, 15 N. Y. Supp. 444; Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Supp. 684.

[14] Burney *v.* Pledger, 3 Rich. L. (S. C.) 191.

[15] Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073. *Cf.* Cone *v.* Ivinson, 4 Wyo. 203, 35 Pac. 933.

[16] *Michigan:* Mattice v. Brinkman, 74 Mich. 705, 42 N. W. 172.

Oregon: Lee Tung *v.* Burkhart, 116 Pac. 1066.

[17] Scollans *v.* Rollins, 173 Mass. 275, 60 N. E. 983, 73 Am. St. Rep. 284.

otherwise be proved.[18] Hence it is not necessary to allege a demand and refusal.[19] Thus in a case where goods were converted and there was afterwards demand and refusal, defendant claimed that the measure of damages was the value at the time of demand and refusal; but it was held that the conversion having been prior to that time, he could recover damages from the time of conversion.[20] On the other hand, the purchaser of property in good faith from one who is not the owner has been held in Louisiana to be only liable for the fruits from the time of suit brought.[21]

The following cases may serve as illustrations of the necessity of finding out by the circumstances of the case the precise point in time at which the conversion takes place. In California, the measure of damages being by the Code, the value of the property at the time of the conversion with interest, plaintiff cannot in an action for the conversion of stock based on the refusal of the corporation to register a transfer recover as part of the damages dividends declared prior to the conversion. Recovery of the dividends after demand would be a separate cause of action.[22]

In another suit in the same State, where plaintiff alleged placing in the hands of defendant as agent a sum of money to be loaned and the agency is denied, it has been held that plaintiff need not allege or prove demand. By denying the agency, the defendant rendered unnecessary allegation and proof of demand.[23]

The commencement of an action for an accounting between partners has been held to be equivalent to a demand by the plaintiff for his share of the partnership property. The defendant by resisting recovery converts it.[24]

Proof of demand is said to be necessary where defendant had an interest in the property and came into lawful posses-

[18] *Georgia:* Scarborough *v.* Goethe, 118 Ga. 543, 45 S. E. 413.

Minnesota: Hogan *v.* Atlantic Elevator Co., 66 Minn. 344, 69 N. W. 1.

[19] Baltimore & O. R. R. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476.

[20] Zindorf *v.* Western American Co., 26 Wash. 695, 67 Pac. 355.

[21] Dyson *v.* Phelps, 14 La. Ann. 722; *cf.* Rideau *v.* Bornet, 1 La. Ann. 408.

[22] Ralston *v.* Bank of California, 112 Cal. 208, 44 Pac. 476.

[23] Becker *v.* Feizenbaum (Cal.), 46 Pac. 837.

[24] Continental Divide Mining Inv. Co. *v.* Bliley, 23 Cal. 160, 46 Pac. 633.

sion of it, and a mere allegation of demand without proof, of course, will not do.[25] Between tenants in common, if one takes property against the other's protest, the latter being present and forbidding the conversion, demand before suit is not necessary.[26] If personal property is taken from the true owner by a wrongdoer and by him sold to an innocent purchaser, the true owner's action, he having been guilty of no wrong or negligence, may be brought without previous demand.[27] And generally, wherever demand would be a useless ceremony, it is unnecessary.[28]

The rule often laid down that one who comes lawfully into possession of property cannot be charged with conversion until after demand and refusal, should probably be qualified by the addition—unless he is guilty of some act of dominion in contradiction to the title or property of the owner. If he commits an overt and positive act of conversion, the character of his possession changes and becomes tortious. The object of securing the refusal by means of the demand is the same, that is, to change the character of possession.[29]

An officer, levying on property (if he knows nothing to rebut the presumption that, being in the possession of the defendant in execution, it is his) cannot be charged with conversion, unless after notice, he insists on retaining possession, and refuses to restore to the owner. In all such cases demand and refusal becomes of great importance.[30]

§ 493. General rule in cases of conversion.

We now come to the examination of the rules which govern damages in the common-law action of trover, or in actions where redress is demanded for the wrongful conversion of specific articles of personal property. In an action for the conversion of personal property, the measure of damages is the value of the property at the time of the conversion, with

[25] Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

[26] Wallor *v.* Bowling, 108 N. C. 289, 12 S. E. 990.

[27] Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140.

[28] E. F. Hallock Lumber & Mfg. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000.

[29] MacDonnell *v.* Buffalo L. T. & S. D. Co., 193 N. Y. 92, 85 N. E. 801.

[30] Pilcher *v.* Hickman, 132 Ala. 574, 31 So. 469.

interest.[31] And if the conversion of part of an article renders the rest worthless for all purposes, the value of the whole may be recovered.[32]

[31] *United States:* Watt *v.* Potter, 2 Mass. 77; Scull *v.* Briddle, 2 Wash. C. C. 150.

Alabama: Williams *v.* Crum, 27 Ala. 468 (*semble*); Massey *v.* Fain (Ala. App.), 55 So. 936.

Arkansas: Ryburn *v.* Pryor, 14 Ark. 505; Jefferson *v.* Hale, 31 Ark. 286.

California: Cassin *v.* Marshall, 18 Cal. 689; Barrante *v.* Garratt, 50 Cal. 112.

Colorado: Sutton *v.* Dana, 15 Colo. 98, 25 Pac. 90.

Connecticut: Lewis *v.* Morse, 20 Conn. 211; Swift *v.* Barnum, 23 Conn. 523 (*semble*); Hurd *v.* Hubbell, 26 Conn. 389; Cook *v.* Loomis, 26 Conn. 483.

Delaware: Vaughan *v.* Webster, 5 Harr. 256; Layman *v.* F. F. Slocomb & Co., 76 Atl. 1094.

Florida: Robinson *v.* Hartridge, 13 Fla. 501; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Georgia: Riley *v.* Martin, 35 Ga. 136; Hilton *v.* Sylvania & G. R. R., (Ga. App.), 68 S. E. 746.

Illinois: Keaggy *v.* Hite, 12 Ill. 99; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Tripp *v.* Grouner, 60 Ill. 474; Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102.

Indiana: Yater *v.* Mullen, 24 Ind. 277.

Iowa: Cutter *v.* Fanning, 2 Ia. 580; Robinson *v.* Hurley, 11 Ia. 410, 79 Am. Dec. 497; Russell *v.* Huiskamp, 77 Ia. 727, 42 N. W. 525.

Kentucky: Sanders *v.* Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167; Freeman *v.* Luckett, 2 J. J. Marsh. 390; Daniel *v.* Holland, 4 J. J. Marsh. 18; Justice *v.* Mendell, 14 B. Mon. 12.

Louisiana: Chamberlain *v.* Worrell, 38 La. Ann. 347; Jennings H. O. Synd. *v.* Housseric-Latreille Oil Co., 127 La. 971, 54 So. 318.

Maine: Hayden *v.* Bartlett, 35 Me. 203; Robinson *v.* Barrows, 48 Me. 186.

Maryland: Stirling *v.* Garritee, 18 Md. 468; Hopper *v.* Haines, 71 Md. 64, 18 Atl. 29, 20 Atl. 159.

Massachusetts: Beecher *v.* Denniston, 13 Gray, 354.

Michigan: Symes *v.* Oliver, 13 Mich. 9; Ripley *v.* Davis, 15 Mich. 75, 90 Am. Dec. 262; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863.

Minnesota: Chase *v.* Blaisdell, 4 Minn. 90; Murphy *v.* Sherman, 25 Minn. 196.

Missouri: Carter *v.* Feland, 17 Mo. 383; Polk *v.* Allen, 19 Mo. 467; Spencer *v.* Vance, 57 Mo. 427; Charles *v.* St. Louis & I. M. R. R., 58 Mo. 458.

Nevada: Carlyon *v.* Lannan, 4 Nev. 156; Newman *v.* Kane, 9 Nev. 234.

New York: Andrews *v.* Durant, 18 N. Y. 496, 62 Am. Dec. 55; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; McCormick *v.* Pennsylvania C. R. R., 49 N. Y. 303; Mechanics' & T. Bank *v.* Farmers' & M. Nat. Bank, 60 N. Y. 40; Wehle *v.* Haviland, 69 N. Y. 448; Prince *v.* Conner, 69 N. Y. 608; Cutler *v.* James Goold Co., 43 Hun, 516; King *v.* Orser, 4 Duer, 431; Devlin *v.* Pike, 5 Daly, 85.

Ohio: Dixon *v.* Caldwell, 15 Oh. St. 412, 86 Am. Dec. 487.

Oregon: Singer *v.* Pearson-Page Co., 115 Pac. 158; Lee Tung *v.* Burkhart, 116 Pac. 1066.

Pennsylvania: Perrin *v.* Wells, 155 Pa. 299, 26 Atl. 543.

Texas: Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757; Hatcher *v.* Pelham, 31 Tex. 201; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Smith

[32] Walker *v.* Johnson, 28 Minn. 147.

§ 493a. Elasticity of the rule—Reduction of damages.

There is no other way of stating the normal rule in conversion than the foregoing, but as the great advantage of the action is its elasticity, the great advantage of the rule is that it can be stretched to cover the facts of any case as it presents itself, and hence the action has been called equitable in character. The normal conversion must be imagined as consisting of a wrongful transfer of title at a given instant of time, and in this case, the rule as it is given applies.[33]

In an action in Pennsylvania for the conversion of three rafts of timber, the defendant asked the court to instruct the jury that "In no event can the plaintiff in this action of trover recover more than the actual value of the three rafts of timber and interest thereon—the value to be fixed by the market value of the timber at the time when and the place where the alleged trover and conversion took place." It was held that it was error to refuse so to instruct.[34]

Ordinarily the plaintiff cannot recover the value of the use, because he recovers the value of the property as of the time when it was taken from his possession, very much as if it were the case of a forced sale.[35] Consequently it is error to render judgment for rent or hire.[36] So in a case of bonds bearing

v. Bates (Tex. Civ. App.), 27 S. W. 1044.

Vermont: Grant *v.* King, 14 Vt. 367; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Crumb *v.* Oaks, 38 Vt. 566.

Wisconsin: Tenney *v.* Bank of Wisconsin, 20 Wis. 152; Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

England: Watson *v.* McLean, 1 E. B. & E. 75; Mulliner *v.* Florence, 3 Q. B. Div. 484; Ried *v.* Fairbanks, 13 C. B. 692; Johnson *v.* Lancashire & Y. Ry., 3 C. P. D. 499.

Canada: Rankin *v.* Mitchell, 1 Han. 495.

[33] *Colorado:* Hannan *v.* Connett, 10 Colo. 171, 50 Pac. 214; Sylvester *v.* Craig, 18 Colo. 44, 31 Pac. 387.

Georgia: Dorsett *v.* Frith, 25 Ga. 537.

Illinois: Wenham *v.* Wilson, 129 Ill. App. 553.

Kansas: Simpson *v.* Alexander, 35 Kan. 225, 11 Pac. 171.

Kentucky: Greer *v.* Powell, 1 Bush, 489.

Maryland: Thomas *v.* Sternheimer, 29 Md. 268.

Nevada: Carlyon *v.* Lannan, 4 Nev. 156.

Pennsylvania: Backentoss *v.* Stahler, 33 Pa. 251, 75 Am. Dec. 592.

[34] Hill *v.* Canfield, 56 Pa. 454.

[35] *New York:* Cutler *v.* James Goold Co., 43 Hun, 516.

Oregon: Singer *v.* Pearson-Page Co., (Ore.), 115 Pac. 158.

[36] Texarkana Water Co. *v.* Kizer, 2 Tex. Ct. Rep. 1056, 63 S. W. 913. But see Moore *v.* King, 4 Tex. Civ. App. 400, 23 S. W. 481.

interest at 4% and worth par, the measure of damages was the value of the bonds with legal interest, not 4% interest, from the date of conversion.[37] Reduction of damages becomes of great importance in case of title to personal property derived from illegal process and sale. The principle is familiar that the moment illegal process is set aside for irregularity, the party in fault becomes a trespasser *ab initio*. The return of the property only goes in reduction of damages. It is no bar to an action for the wrong.[38] In such cases, the fact that the defendant is a creditor of the plaintiff does not reduce damages.[39] On the other hand, where there was a seizure of goods on a void writ, and the defendant procured the goods subsequently to be seized on a valid writ, when they were sold and the proceeds paid in on the claim, this could be shown in reduction. The law here makes the application.[40] So amount due for taxes may be applied in reduction.[41] In an action for conversion of cattle by delivery to one not entitled, defendant may show in reduction of damages that plaintiff has received payment for the cattle and has not been damnified, or that his damages are merely nominal.[42] And it has been said that the measure of damages is the actual value at the date of conversion minus any claim which the defendant had on the property.[43] But ordinarily mere possession is a sufficient title on which to recover, and the action cannot be defeated, nor damages mitigated, by proof of ownership in some one else, unless he shows connection with the owner, so that he can stand upon his right; or that the property has gone to his use.[44]

Where the goods have been returned, the reduction is ordinarily the net receipts, taking the expense out of the value of the goods as returned; but here again the elasticity of the rule is shown, and if it is for any reason not proper in this action to make allowance for such expense, it will not be

[37] Govin *v.* DeMiranda, 140 N. Y. 474, 35 N. E. 626.

[38] Kerr *v.* Mount, 28 N. Y. 659; Johnson *v.* Marks, 66 Misc. 153, 121 N. Y. Supp. 294.

[39] Kelley *v.* Archer, 48 Barb. (N. Y.) 68.

[40] Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748.

[41] Clements *v.* Eisely, 63 Neb. 651, 88 N. W. 871.

[42] Stone *v.* Chicago, M. & S. P. Ry., 3 S. D. 330, 53 N. W. 189.

[43] Merchants' Nat. Bank *v.* Williams, 110 Md. 334, 72 Atl. 1114.

[44] Wooley *v.* Edson, 35 Vt. 214.

done. So in an action for conversion of oxen, when the oxen were taken into New York and there the plaintiff obtained possession of them by legal process, and he now brings this action, in which he seeks to recover the expenses of regaining the property, it is held that he cannot recover, having chosen to resort to a form of action in which he got possession of the goods. He is restricted to the costs allowed in that action and cannot bring trover to recover the expenses not there allowed.[45]

Where the articles are returned and accepted, it is obvious that the title does not finally change. Hence interest cannot always be the proper measure of damages. The plaintiff may claim damages for the use and deterioration.[46] And when the property has been sold and the proceeds applied to the plaintiff's debt, the reason for the ordinary rule forbids its application.[47] On the other hand, if the whole proceeding is void, as on a void execution, defendant's offer to apply the amount on the judgment goes for nothing if plaintiff does not consent.[48] When the thing converted is reduced to money in the hands of the defendant, the smallest measure of damages must be the amount received, with interest.[49]

Statutory changes or a local judicial divergence from the general view of the character of the action make the rule of damages still more elastic in many jurisdictions. Thus in Texas, judgment in conversion may be for the return of the property, or for its value; and during the existence of slavery, the recovery might be not only for the value of a slave, but for damages equal to the value of his services,[50] the court going so far as to say that the old rule for the measure of damages in trover had no application to the remedial system prevailing in Texas. In Missouri by statute, interest is within the discretion of the jury.[51] Under this statute it is error to

[45] Harris *v.* Eldred, 42 Vt. 39.

[46] Shotwell *v.* Wendover, 1 Johns. (N. Y.) 65.

[47] Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 361, 25 Am. Dec. 396.

[48] Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2.

[49] *United States:* Ewart *v.* Kerr, 2 McMill. 141.

Minnesota: Nininger *v.* Banning, 7 Minn. 274.

[50] Pridgin *v.* Strickland, 8 Tex. 427, 435, 58 Am. Dec. 124.

[51] State *v.* Hope, 121 Mo. 34, 25 S. W. 893.

direct the jury to give interest.[52] In Georgia it has been said that where the action is for the conversion of a mule and the recovery of hire, interest as such is not recoverable in the action, this appearing to be a transposition of the opposites, on the ordinary rule that the allowance of interest excludes the recovery of hire.[53]

§ 494. Conversion by temporary wrongful use.

Although the conversion generally deprives the owner of the property, it does not necessarily do so. The property may, on return by the wrongdoer, be accepted. In that case, of course, the measure of damages is not the whole value of the property, but compensation for the injury done to the property,[54] which would usually be the value of the use or interest on the value of the property while it was withheld from the plaintiff [55] together with the deterioration in its market value if any.[56]

So where the defendant withheld possession of a certificate of stock belonging to the plaintiff, the court held that since that act could not deprive the plaintiff of his property in the stock the measure of damages was not the value of the stock.[57] Where the plaintiff's stock in trade was seized upon an execution which afterward proved void, and after several days he bought it back by paying the amount of the execution and costs, the measure of damages was held to be, first, the expense of securing the goods, which would include the costs and counsel fees included in the execution; second, the depreciation in value of the goods during detention; and third, interest on the value of the goods during detention, or at the plaintiff's option the value of his business during the time he was deprived of

[52] Hawkins *v.* Kansas City H. P. B. Co., 63 Mo. App. 64.

[53] Martin *v.* Oslin, 94 Ga. 658, 19 S. E. 988.

[54] Williams *v.* Crum, 27 Ala. 468.

[55] Kinnear *v.* Robinson, 2 Han. (N. Brun.) 73.

[56] *United States:* Hoyt *v.* Fuller, 43 C. C. A. 466, 104 Fed. 192.

Alabama: Renfro *v.* Hughes, 69 Ala. 581.

Illinois: Davenport *v.* Ledger, 80 Ill. 574.

Massachusetts: Lucas *v.* Trumbull, 15 Gray, 306.

Texas: Carter *v.* Roland, 53 Tex. 540.

Canada: Kinnear *v.* Robinson, 2 Han. 73. The defendant cannot avail himself to diminish the damages of anything which lessens the value while in his wrongful possession.

[57] Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91.

his stock in trade.[58] There is no reason why, when the title does not change, damages should not in the case of particular species of property be allowed for the value of the use, but, the title once vested in the defendant, interest does not take its place.[59] In National Bank *v.* Rush [60] it was held that where the owner recovers the property, the measure of damages is the expense necessarily incurred, together with the value of the time spent in recovering it, and the value of the use—not exceeding the total value of the property at the time of the conversion.

Where the conversion is by temporary wrongful use, the action takes the place of *detinue*, and the measure of damages changes so as to fit the circumstances of the particular case. The property has been returned but the plaintiff is not entitled to merely nominal damages. One of the cases most often cited is that of an action for the conversion of a horse driven by the hirer beyond the agreed destination. Here the plaintiff is entitled to recover the difference between the value of the property at the time of its conversion and when it was returned; it is competent to show the value of the horse when it left the stable and before it arrived at the place where it was converted. The plaintiff having testified that the horse was worthless when it was returned, and on cross-examination that he had afterwards traded it off, it was competent to ask him on re-direct examination what he got for the horse and what expense he had been put to. The defendant having testified that the horse was permanently lame before he hired it, plaintiff was permitted, although he had previously shown the condition of the horse, to show in rebuttal that it was not lame.[61] The same measure has been held to apply in a case of seizure and return of liquor by a military officer.[62] And in that of unauthorized temporary use of oxen by an agister.[63]

[58] Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

[59] Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608.

[60] 56 U. S. App. 556, 565, 29 C. C. A. 333, 85 Fed. 539. *Cf.* Dodson *v.* Cooper, 37 Kan. 346, 349, 350, 15 Pac. 200; Sprague *v.* Brown, 40 Wis. 612, 619, 621; Curtis *v.* Ward, 20 Conn. 201, 206; Hurlburt *v.* Green, 41 Vt. 490, 492, 494; United States *v.* Pine R. L. & I. Co., 49 U. S. App. 24, 24 C. C. A. 101, 78 Fed. 319.

[61] Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243.

[62] Bates *v.* Clark, 95 U. S. 204, 24 L. ed. 471.

[63] Gove *v.* Watson, 61 N. H. 136.

On the other hand, where machinery was taken and returned after ten days, the measure of damages was held to be the value of the use or rental value for that time.[64] In another case, of conversion by a sheriff, plaintiff having bought at the sheriff's sale and not having been deprived of the use at all, the measure of damages is what he paid to get the property back.[65] Where corn in the crib was converted by a wrongful levy and the value of the use was nothing, plaintiff demanded damages equal to the intermediate highest market value on the ground that he might have sold it at that time. The question was not decided, as it was proved that the value remained as high for some time after the recovery of the property.[66]

§ 494a. Return and acceptance—Reduction.

A cause of action for conversion having been established, a return of the property is no bar to the action, but is admissible in mitigation of damages.[67] This is the rule generally laid down, but in connection with it it should be noticed, as pointed out by Bramwell, L. J.,[68] that the term *conversion* is used in two different senses, one, as simply describing the cause of action, and the other, as conversion in its effect on the measure of damages. The conversion, as a cause of action, may be complete, but the quantum of damages varies in every case. The measure of damages in conversion, therefore, may be anything from nominal damages up to the full value of the property, and, as we shall see, special damages may be added.

In a leading case in New Jersey[69] the plaintiffs delivered to one G a drying machine under a conditional sale. The machine weighed seven tons and may or may not have been a fixture. The defendant, as sheriff, made a levy on the factory and lands under an execution against G. On the 24th of June, plaintiffs demanded in writing the delivery of the machine. The defendant immediately erased the machine from

[64] Baldwin *v.* G. M. Davidson & Co., 127 S. W. 562 (Tex. Civ. App.).

[65] Fields *v.* Williams, 91 Ala. 502, 8 So. 808.

[66] Hoyt *v.* Fuller, 104 Fed. 192, 43 C. C. A. 466.

[67] Aylesbury Mercantile Co. *v.* Fitch, 22 Okla. 475, 99 Pac. 1089.

[68] Hiort *v.* London & N. W. Ry., 4 Ex. Div. 188.

[69] Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109.

his inventory and levy on personal property, intending to hold it, if at all, as part of the realty, but on June 30th wrote "by direction of counsel we will hold the dryer." An action of trover was brought July 2d. On July 9th defendant wrote to plaintiffs' attorney disclaiming title except in connection with the levy on realty, and therefore tendered $15 to cover costs. A verdict for the plaintiffs for the full value of the machine having been directed by the trial court, the Supreme Court set the verdict aside on the ground, first, that the letter of June 30th was sufficient evidence to sustain the action; second, that the refusal of the defendant to disclaim a lien on the machine in virtue of his levy on the lands was no evidence of a conversion; third, that the renunciation by him of any claim upon the machine as personal property effected a complete restoration of the property, supposing it to be personal property, to the plaintiffs; and fourth, that the defendant never having taken possession of the property, and the machine not having deteriorated in value in the interval between June 30th and July 9th, plaintiffs could recover only nominal damages.

In a case in Wisconsin [70] where the action was for the conversion of a certificate of stock, the certificate was returned to and accepted by the plaintiff, and a verdict was directed in his favor for nominal damages. The plaintiff had previously attempted to amend his complaint by alleging consequential damages to the amount of upwards of $1,000, owing to his having been subjected to great trouble and expense in order to regain repossession of the certificate. But the court held that the return and acceptance extinguished the whole cause of action, and that the plaintiff, by taking back the property, had waived the entire conversion. Under the circumstances of the case it was held also that even his right to costs was gone, and the defendant had judgment for costs and disbursements. In another case in the same State [71] where the goods sued for were returned to and accepted by the plaintiff pending the trial, and no special damages were shown, it was held also that the plaintiff was entitled to nominal

[70] Collins *v.* Lowry, 78 Wis. 629, 47 N. W. 612.

[71] Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778.

damages; and this was said to be a sufficient foundation for costs. The court repudiates the rule laid down in Collins *v.* Lowry, and the result of the case seems to be that had special damages been shown, the plaintiff could have recovered for them. This would seem to be the true rule.

When return and tender, kept good, are set up in mitigation, all the facts must be called to the attention of the jury under proper instructions.[72]

In some cases, where the facts are clear, an agreement on the part of the plaintiff to accept may be dispensed with, *e. g.*, if the property be shown to have gone, subsequently to the conversion, into the possession or under the control of the plaintiff who is suing, or to his use, this will go in mitigation of damages, though not in bar of the action, without proof of any express agreement to receive it.[73] The measure of damages in this class of cases is generally laid down as being the difference in value of the property at the time of conversion and when returned.[74] This, of course, covers deterioration; but the plaintiff is also entitled to the value of the use.[75]

Where the plaintiff took legal steps to get the property back the case is otherwise. If he merely attached the property, this of itself gives him no beneficial right in it, and does not amount to a return nor result in a diminution of damages.[76]

§ 494b. Return by order of court.

Both in England and in some of the United States the power of the court to compel a return and acceptance of the property in any proper case, has long been recognized. The cases usually mentioned as not adapted to this relief are where the original taking was wilful, where the property has deteriorated in value, or where there was a wilful refusal to surrender on demand. In the first and last cases the question of exemplary damages may be raised, and in the second, a verdict would generally be necessary upon the question of

[72] Seaboard A. L. R. R. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

[73] Yale *v.* Saunders, 16 Vt. 243.

[74] Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243.

[75] *United States:* Coulson *v.* Panhandle Nat. Bk., 54 Fed. 855, 4 C. C. A. 616.

Kentucky: Louisville & N. R. R. *v.* Young, 1 Bush, 401.

[76] Lewis *v.* Morse, 20 Conn. 211.

value. The existence of the power is of great importance; it supplements the effect of voluntary return and acceptance in adjusting the measure of damages to the real value of the rights lost or injured, by direct judicial control analogous to that of a Court of Chancery. The origin and development of the practice in England is lucidly analyzed and explained by Redfield, J., in a Vermont case,[77] in an opinion in substance as follows:—Of the right of the defendant in actions of trover and trespass *d. b. a.* in English courts, to surrender the property taken in specie, in mitigation, or in many cases in satisfaction of damages, there can be no manner of doubt. While the action of detinue continued in use, no such right of return was allowed in trover or trespass, except by the consent of the plaintiff; but later on, after detinue fell into disuse, the courts were almost constantly pressed to receive the surrender of the thing claimed, as had been practised in detinue. Their ingenuity was taxed to find some good excuse for refusal, but the absurdity of the reason given served but to show more clearly the fallacy of the conclusion. They answered that they did not "keep a warehouse," and so could not order a surrender of the property except in case of money *in numero.* But it seems soon to have been perceived that in making this concession they had yielded the whole ground. Accordingly, the rule acknowledged in the case of money was extended to pictures and other goods not cumbrous or perishable. So the matter remained until after the middle of the 19th century.[78]

The rule seems fully to have been established in King's Bench in Fisher *v.* Prince[79] where Lord Mansfield put the matter in this way:

"Such motions are neither to be refused nor granted as *of course;* they must depend on their own circumstances. No injury is done the plaintiff if the court should think he ought not to proceed for damages beyond a specified point, because he may still proceed for more *at the peril of costs.*"

In the case at bar Lord Mansfield declined to apply the rule, the goods having been altered and their value changed.

[77] Hart *v.* Skinner, 16 Vt. 138, 141, 42 Am. Dec. 500. This power is, of course, merely an exception to the general rule; see *ante,* § 53.

[78] Buller's N. P. 49; 6 Bac. Abr. 483, 484, 708.

[79] 3 Burr. 1363.

The rule was extended to the case of goods taken by way of trespass, where the defendants, officers of the excise or revenue on leather, by mistake, made the seizure, and where the goods had suffered no damage.[80]

The rule seems to have been recognized as the settled law in Westminster Hall.[81] In this country the practice is recognized in a few jurisdictions and regulated by the courts, or by statute, or both.

In an action for the conversion of bonds, plaintiffs alleged special damages in raising funds to relieve their property from attachment. Before trial the defendants offered in court to deliver the bonds to the plaintiff and pay their costs already accrued, and the County Court made an order to allow them to bring bonds and costs into court for the plaintiffs, and that if the latter refused to receive them, they must proceed at their peril as to further costs, unless they succeeded in recovering more than nominal damages above the face of the bonds. This was decided to be a proper exercise of the power of the court, and the defendant having complied with the order, and the plaintiffs having failed in an attempt to prove any case differing materially from that which was already in proof, was held to be entitled only to nominal damages.[82]

In Georgia, it has been held that a verdict may be rendered for damages with the condition that it may be discharged on returning the property sued for. The defendant in such cases must elect to do one or the other. He cannot restore a part and pay a part.[83]

§ 494c. Property bought back by owner.

If goods are wrongfully seized and sold, and the plaintiff buys the property in at the sale, the measure of damages is the amount he pays to get it back, whether that is more or less than the real value.[84] This is really a recovery of the

[80] Pickering *v.* Trustees, 7 T. R. 53.

[81] Earle *v.* Holderness, 4 Bing. 462, 15 E. C. L. 41; Cook *v.* Hartle, 8 Car. & P. 568, 34 E. C. L. 528.

[82] Rutland R. R. *v.* Bank of Middlebury, 32 Vt. 639.

[83] Foster *v.* Brooks, 6 Ga. 287; Mitchell *v.* Printup, 19 Ga. 579.

[84] *Pennsylvania:* Kline *v.* McCandless, 139 Pa. 223, 20 Atl. 1045.

Texas: Muenster *v.* Fields, 89 Tex. 102, 33 S. W. 852 (*overruling* Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181).

expense of getting the property back; and if the property has depreciated in value, he should also get the loss in value as special damages. So where, upon conversion of goods by a sheriff who attaches and sells as goods of third person, plaintiff buys them back from the purchaser, in an action for the conversion, his measure of damages is the amount paid to purchase the goods, not exceeding the value.[85] And where a sheriff seized and sold property of plaintiff's intestate, some of which was exempt, and plaintiff in the attachment suit bought it in and sold it to plaintiff's intestate, it was held that the measure of damages for the exempt property was the amount paid to get it, which would be arrived at by apportioning the entire amount paid between the exempt and the non-exempt property, in proportion to its value as shown by the evidence.[86] In the case of a horse wrongfully distrained for taxes, where it was sold and bid off by the plaintiffs, his measure of damages is the amount of his bid.[87] So the owner may recover the amount of a reasonable reward paid to get the property back.[88]

§ 495. Value, how determined.

The value of anything is not limited to the immediate cash value, that is, the price it would bring cash down.[89] Nor to its value for a particular use, if it has a more valuable use. Logs of cedar fit for paving are not to be valued as firewood.[90]

Defendant sold plaintiff's slaves. Held that he was accountable for the proceeds, in spite of the fact that subsequent emancipation would have made them valueless if he had retained them; but for slaves which were emancipated but which he did not sell he was not liable.[91]

[85] Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200.

[86] Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

[87] Hurlburt *v.* Green, 41 Vt. 490.

[88] Greenfield Bank *v.* Leavitt, 17 Pick. (Mass.) 1; see Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

[89] Kasper *v.* Walla, 49 Neb. 288, 68 N. W. 476.

So where a fence was converted, the measure of damages, in the absence of a market for standing fences, was the *actual* value at the time and place. Harrison *v.* McGehee (Tex. Civ. App.), 139 S. W. 613.

[90] LaChappelle *v.* Warehouse & B. S. Co., 95 Wis. 518, 70 N. W. 589; *ante*, § 252.

[91] Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657. The liability of a person to pay the value of slaves wrongfully appropriated is not affected by the fact of the subsequent abolition

The value recovered is usually the market value, not the cost of production,[92] nor the consideration paid.[93] Where goods were wrongfully sold on execution, it was held that the price obtained at the auction sale was competent evidence of their value.[94] In an early case,[95] Abbott, C. J., said that the plaintiff was not *bound* by the sum at which goods were sold by the defendant at auction, "but where the plaintiff is an assignee, who must have sold the goods if they had come to his hands before any sale by the sheriff, it *often happens that a jury considers* the sum at which the goods were actually sold at auction, as a fair measure of damages." Where the goods are contained in a number of packages the value is not what could be obtained on a sale of the entire number of packages, but the aggregate market value of the separate packages at the time.[96] In the case of household furniture, the original cost having been proved, deterioration, through wear and tear, etc., may be shown.[97]

§ 496. Value, where to be estimated.

As a general rule, the value of the property is to be taken at the place of conversion.[98] So for the conversion of a piano in Alaska the measure of damages is the value of the piano there.[99] And where plaintiff shipped lilies from Bermuda by express to customers in New York, and the goods were delivered to defendant, a florist, the measure of damages was held to be the value of the flowers at the time and place of conversion; that is, in New York just before Easter.[100] It seems to have been held by the New York Court of Appeals, that the value of foreign goods in an action of trover should be ascertained by the custom-house valuation of them in this

of slavery. Calhoun *v.* Burnett, 40 Miss. 599.

[92] Gunn *v.* Burghart, 47 N. Y. Super. Ct. 370; *acc.*, Sigel-Campion Live Stock Com. Co. *v.* Holly, 44 Colo. 580, 101 Pac. 68.

[93] Kingsbury *v.* Smith, 13 N. H. 109.

[94] Heinmuller *v.* Abbott, 34 N. Y. Super. Ct. 228.

[95] Whitehouse *v.* Atkinson, 3 C. & P. 344.

[96] Miller *v.* Jannett, 63 Tex. 82.

[97] Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214.

[98] *California:* Hamer *v.* Hathaway, 33 Cal. 117.

Massachusetts: United S. M. Co. *v.* Holt, 185 Mass. 97, 69 N. E. 1056.

[99] Lines *v.* Alaska Commercial Co., 29 Wash. 133, 69 Pac. 642.

[100] Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244.

country, if made nearly at the time of the conversion.[101] But where the plaintiffs, lumber dealers doing business at Troy, bought lumber to be sold in their lumber-yard there, in an action for its conversion, it was held error to charge that if the lumber was to be taken to Troy to be sold there, the plaintiffs were entitled to recover the value at Troy, less the expenses of transportation.[102]

A distinction must be noticed between the value of a thing and the evidence of its value. When there is a market for the chattel at the place where its value is to be shown, the market value establishes its actual value; but where there is no market at the place, its value must be established by other evidence, which is ordinarily its value in the nearest market.[103] So where logs are converted in a river the measure of damages is the value of the logs at the nearest market less the cost of moving the logs there;[104] and so in an action for the conversion of plows of a peculiar kind made for sale in Nebraska, the market value of the plows in Nebraska may be shown, with the expense of getting them there and selling them, to indicate their value in Wisconsin where there was no sale for them.[105]

§ 497. Value, when to be estimated.

Upon general principles, the value of the property at the time of the conversion should be the measure of damages, and that is the rule generally adopted.[106] If the conversion is established by a demand and refusal, the value should be estimated at the time of the refusal.[107]

[101] Caffe *v.* Bertrand, 1 How. App. 224.

[102] Spicer *v.* Waters, 65 Barb. 227.

[103] *Ante*, §§ 244, 246, 247.

Iowa: Gensburg *v.* Marshall Field & Co., 104 Ia. 599, 74 N. W. 3.

Massachusetts: Selkirk *v.* Cobb, 13 Gray, 313.

New York: Tiffany *v.* Lord, 65 N. Y. 310; Fleischman *v.* Samuel, 18 App. Div. 97, 45 N. Y. Supp. 404.

North Carolina: Boylston Ins. Co. *v.* Davis, 70 N. C. 485.

Tennessee: Fort *v.* Saunders, 5 Heisk. 487.

[104] Hodson *v.* Goodale, 22 Ore. 68, 29 Pac. 70.

[105] Lathers *v.* Wyman, 76 Wis. 616, 45 N. W. 669.

[106] *United States:* Sedgwick *v.* Place, 12 Blatch. 163.

Louisiana: Arrowsmith *v.* Gordon, 3 La. Ann. 105.

Michigan: Greeley *v.* Stilson, 27 Mich. 153.

Texas: Norwood *v.* Cobb, 37 Tex. 141.

England: France *v.* Gaudet, L. R. 6 Q. B. 199; Falk *v.* Fletcher, 18 C. B. (N. S.) 403.

[107] *United States:* Dows *v.* National

Where the defendants, holding certain bonds of the plaintiff's as security for a loan void for usury, sold them first at auction where they purchased them themselves, and subsequently resold them at private sale, the private sale was held to be the conversion, and the value at that time was held to furnish the measure of damages.[108] And where property attached on mesne process remains in the plaintiff's possession until judgment and execution in the attachment suit, the measure of his damages is the value of the property at the time it was taken on execution, with interest.[109] Where bonds of the plaintiff were stolen from the defendant by its negligence, the measure of damages is the value of the bonds at the time of the theft, not at the time of a demand by the plaintiff.[110] So, where an officer had wrongfully taken from the plaintiff a promissory note, the maker of which was then solvent, but who became insolvent before the officer offered to return it, the measure of damages was held to be the value of the note at the time of the conversion, and interest.[111] Where property was attached by plaintiff, a deputy sheriff, and held under attachment, an outstanding leasehold interest could not be seized; but the lease came to an end during the attachment, and before the conversion. Plaintiff was held entitled to recover the value of the property when converted by the assignee of the owner taking it out of his hands.[112] In an action against a director for wrongfully taking a gift of shares from the company, the measure of damages is the

Exchange Bank, 91 U. S. 618, 23 L. ed. 214.

Illinois: Northern Transportation Co. *v.* Sellick, 52 Ill. 249.

Massachusetts: Eastern R. R. *v.* Benedict, 10 Gray, 212, 66 Am. Dec. 384.

Minnesota: Dolliff *v.* Robbins, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466.

Missouri: Carter *v.* Feland, 17 Mo. 383.

Tennessee: Fort *v.* Saunders, 5 Heisk. 487.

Utah: Walley *v.* Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 147.

[108] Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308.

[109] Henshaw *v.* Bank of Bellows Falls, 10 Gray (Mass.), 568.

[110] Third National Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

[111] King *v.* Ham, 6 All. (Mass.) 298. In the case of goods on hand for sale, this value may include the expected profit of the sale. Ebenreitter *v.* Dahlman, 41 N. Y. Supp. 559, 18 Misc. 351, 75 N. Y. St. Rep. 948; Rheinfeldt *v.* Dahlman, 43 N. Y. Supp. 281, 19 Misc. 9.

[112] Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164.

actual value of the shares at the time of the gift being accepted by the director.[113] For the conversion of stock in which plaintiff owns a remainder after a life interest, his measure of damages is the value of the stock at the death of the life tenant.[114] Evidence may, of course, be competent as bearing on the value at the time of conversion though it relates to facts of a different time. Thus in an action for the conversion of a judgment, though the judgment debtors were insolvent at the time of conversion, they afterwards became solvent. Evidence of this showed what the judgment was worth to the plaintiff.[115] The general principle may be modified by the circumstances considered in the next section.

§ 497a. Result of following the property.

In Ingram *v.* Rankin,[116] Taylor, J., said that damages higher than the value at the time of conversion might be recovered in two cases: first, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; and second, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted. It would seem, however, that even in these cases the principle of damages *in the action of trover* should not be changed. The result indicated is obtained by invoking the principle of following the property in the hands of the wrongdoer. If the property remains in the possession of the wrongdoer, the owner may obtain it in an action of replevin, or he may demand it, and in case of refusal bring an action of trover founded upon the demand and refusal and recover the value of the property at the time and place of the demand. If the wrongdoer has disposed of the property the owner has the option of waiving the

[113] Montgomerie's Brewery Co. *v.* Blyth, 26 Vict. L. R. 612.

[114] Caulkins *v.* Gaslight Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

[115] Rivinus *v.* Langford, 75 Fed. 959, 21 C. C. A. 581, 33 L. R. A. 250.

[116] 47 Wis. 406, 420, 2 N. W. 755, 32 Am. Rep. 762.

tort and recovering the proceeds of the property in an action for money had and received. In Texas it seems that this doctrine will be applied, at least in case of conversion by a fiduciary, even though the property may not remain in the hands of the defendant. Thus it has been held in an action for the conversion of money that plaintiff is not limited to the principal sum and interest, but may recover the total amount of money gained through the conversion.[117] And where an assignee for creditors wrongfully appropriated property belonging to the estate, the creditors were allowed to recover the value of the property at the time of trial.[118] The procedure in such a case is in substance equitable.

§ 497b. Recovery by owner of a limited interest.

Where an action for the conversion of a chattel is brought by one having a limited interest in it, he should recover no more than the value of his interest, unless he was in possession at the time of conversion and the defendant was a stranger to the title, in which case he should recover the entire value of the chattel.[119]

This principle is illustrated by cases where the goods of a partnership are converted. Each partner is in possession of such goods, and may recover the entire value against a stranger. So upon a wrongful sale of partnership goods on writ against one partner, in a suit by the other partner, the entire value of the goods converted can be recovered.[120] But against the other partner or one entitled to his rights, a partner can recover only half, that being the amount of his legal interest in the property. So in an action by the assignee of one partner for the conversion of the firm property by a sale of it by the other partner, it was held that the measure of damages was the value of plaintiff's undivided interest, without regard to insolvency or the state of the partnership accounts.[121] But where in an action against a partner, partnership property was attached, and the

[117] Black *v.* Black, 4 Tex. Ct. Rep. 178, 67 S. W. 928.

[118] McCord *v.* Nabours, 101 Tex. 494, 109 S. W. 913.

[119] *Ante*, §§ 76, 78.

[120] Summers *v.* Heard, 66 Ark. 550, 562, 50 S. W. 78.

[121] Carrie *v.* Cloverdale Banking & C. Co., 90 Cal. 84, 27 Pac. 58. *Cf.* Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625.

partner being insolvent, the attaching officer delivered the property to his assignee, it was held that the solvent partner could recover the full value of the property, without reduction on account of delivery to the assignee, since the solvent partner was entitled to the property to close up the partnership.[122]

Receiptors are chargeable with the valuation adopted, and are responsible if they let any portion of the goods go back into the possession of the debtor. Goods attached were given to a receiptor valued at $150, and a small part of the goods were taken by a paramount title. It was held that he was not responsible for this, but that the actual value of these goods would be deducted from the value in the receipt and he would be held for the balance, although this was greatly in excess of the actual value.[123]

Plaintiff, having by contract an interest in railway ties to the amount of ten cents each, in an action for conversion is entitled to the amount reserved to him under the contract, with interest, and not the value of the ties.[124] By an agreement for the curing of prunes, plaintiff was to have two per cent of the value. The owner converted. It was held that the measure of plaintiff's recovery was the value of his interest in the prunes, that is, two per cent.[125]

The principle is also illustrated by actions for the conversion of garnished or trusteed property. Defendants attaching and converting garnished property, with knowledge of the garnishment proceedings, are liable for the amount which plaintiffs would have realized.[126] In the case of conversion of trusteed property taken from the possession of the trustee by the defendant, he is liable in damages to the amount of the judgment in the trustee suit not exceeding the value of the property.[127]

Some of the commoner classes of cases illustrating this general principle will be considered in the following sections.

[122] Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432.

[123] Healey *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332; see Cross *v.* Brown, 41 N. H. 283.

[124] Harvey *v.* Morse, 69 N. H. 475, 45 Atl. 239.

[125] California Cured Fruit Assoc. *v.* Ainsworth, 134 Cal. 461, 66 Pac. 586.

[126] Focke *v.* Blum, 82 Tex. 440, 17 S. W. 770.

[127] Deno *v.* Thomas, 64 Vt. 358, 24 Atl. 140.

§ 497c. Conversion of pledged property: action by pledgor.

In an action by the pledgor against the pledgee for conversion of the pledged goods the measure of damages is the value of the property, minus the debt.[128] So where a pledgee converts a bond and mortgage held as security, the measure of recovery is the actual, not the face value of the security, minus the debt;[129] and the same is true where a pledged note is converted.[130] Where a pledgee of stock, having an option to buy at a specified price, converted the stock, it was held that if the stock was worth more than the option the plaintiff could not recover any more, because that was the extent of the damage. If on the other hand it was worth less, the plaintiff might consider the conversion an election to purchase the stock and hold the defendant for the agreed price. The option price was therefore held to be the measure of damages.[131]

If the debt has been paid, the pledgor may recover the entire value of the property converted. So where a mortgagee deposited a chattel mortgage in pledge for a debt of his own, and the pledgee collected his own debt out of the goods and then gave up the mortgage to the mortgagor, who destroyed it, the measure of damages for this conversion was held to be the value of the mortgage at the time of conversion.[132] Tender of payment will have the same effect as actual payment. So where a pledgee sold the property after a tender to him of the whole amount of the debt, the tender discharged the lien, and the pledgor could recover the full value of the property.[133]

§ 497d. Action by pledgee.

Where the pledgor converts the pledged goods, the pledgee cannot recover the full value of the goods, but is limited to the amount of the debt secured by the pledge.[134] If a stranger converts the goods, the pledgee recovers the full value, being

[128] First Nat. Bank *v.* Boyce, 78 Ky. 42, 39 Am. Rep. 198; *ante*, § 78.

[129] Barber *v.* Hathaway, 47 App. Div. 165, 62 N. Y. Supp. 329.

[130] Hallack Lumber & Manuf. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000.

[131] Upham *v.* Barbour, 65 Minn. 364, 68 N. W. 42.

[132] Nesbitt *v.* Moore, 39 S. C. 351, 17 S. E. 798.

[133] Hyams *v.* Bamberger, 10 Utah, 3, 36 Pac. 202.

[134] Bradley *v.* Burkett, 82 Ga. 255, 11 S. E. 492; Bell *v.* G. Ober & Sons Co., 96 Ga. 214, 23 S. E. 7.

answerable to the pledgor for the balance over the amount of the debt;[135] but where the act, though wrongful as against him, is good so far as the pledgor is concerned, the measure of damages is the same as that in an action against the pledgor, that is, the amount of the debt. So in an action by the pledgee to recover from a sheriff for the seizure of goods under process sued out by creditors of the pledgor, the amount recovered is the value of the interest of the pledgee in the goods.[136] And so in a suit against a company for calling in and cancelling shares without notice to him, the pledgee recovers only the amount due from the pledgor, with interest.[137]

§ 497e. Conversion of mortgaged property; action by mortgagor.

In an action by the mortgagor against the mortgagee for a conversion of the mortgaged property, the measure of damages is the value of the goods over and above the amount required to satisfy the mortgage.[138] So in the case of mortgaged goods wrongfully taken and sold by the mortgagee, together with other goods, the mortgagor recovers the value of the mortgaged goods less the amount of the mortgage, and the full value of the goods not mortgaged.[139]

In an action by a mortgagor in possession against a stranger the plaintiff recovers the entire value of the property.[140] If however after the conversion the mortgagee takes possession, this is an application of the property to the use of the mortgagor, and the recovery must be for the value as reduced by it.[141]

[135] Cramer *v.* Marsh, 5 Col. App. 302, 38 Pac. 612; *ante*, § 76.

[136] Cramer *v.* Marsh, 5 Col. App. 302, 38 Pac. 612; *ante*, § 78. But see Einstein *v.* Dunn, 171 N. Y. 648, 63 N. E. 1116, 32 Civ. Proc. 64, 61 App. Div. 195, 70 N. Y. Supp. 520.

[137] Brown *v.* Union S. & L. Assoc., 28 Wash. 657, 69 Pac. 383.

[138] *United States:* Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

Arkansas: Jones *v.* Horn, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17.

Iowa: Howery *v.* Hoover, 97 Iowa, 581, 66 N. W. 772.

Kansas: Burton *v.* Randall, 4 Kan. App. 593, 46 Pac. 326.

Ante, § 82.

[139] Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

[140] Vandiver *v.* O'Gorman, 57 Minn. 64, 58 N. W. 831.

[141] Dahill *v.* Booker, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465.

§ 497f. Action by mortgagee.

The mortgagee of chattels is ordinarily out of possession, and his interest in the goods is merely as security for the debt. Even against a stranger, therefore, his recovery is limited to the amount of the mortgage debt.[142] Whether he is in possession of the goods or not, if his action is against the mortgagor or one claiming under him his recovery, while of course it cannot exceed the value of the goods, is limited to the amount due on the mortgage debt. So in an action against a purchaser from the mortgagor the mortgagee can recover no more than the amount of his debt;[143] and in an action against a sheriff attaching at the suit of a creditor he is also limited to the amount of the debt.[144] If, however, the illegal attachment involved a denial of the mortgagee's right in the goods, the mortgagee is allowed in some jurisdictions to recover the full value of the chattel.[145]

The mortgagee's recovery of the amount due on the mortgage is reduced by the value of any portion of the mortgaged goods which were not converted,[146] or by any portion of the goods or their proceeds which was returned to him.[147] Where part of the goods were returned to the mortgagee, who at once sold them on foreclosure, and bid them in, and afterwards resold them for a much larger amount than he had bid, the recovery for the conversion is to be reduced by the amount which he bid at the sale, and not by the amount which he

[142] Roberts *v.* Kain, 6 Rob. (N. Y.) 354 (action by assignee of mortgagee).

[143] *Alabama:* Seibold *v.* Rogers, 101 Ala. 438, 18 So. 312.

Massachusetts: West *v.* White, 165 Mass. 258, 43 N. E. 103.

[144] *California:* Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601.

Michigan: Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661.

Montana: Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. 533.

Nebraska: Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477.

Contra, Kansas: Jones *v.* Kellogg, 51 Kan. 263, 284, 33 Pac. 997, 37 Am. St. Rep. 278, where it is said that the sheriff is a stranger, and except so far as the proceeds of the attachment have actually been turned over to the mortgagor or his benefit the mortgagee recovers the full value of the property.

[145] *Connecticut:* Aldrich *v.* Higgins, 77 Conn. 370, 59 Atl. 498.

Massachusetts: Hanly *v.* Davis, 166 Mass. 1, 43 N. E. 523. *Cf.* Rund *v.* Blatt, 170 Mass. 469, 49 N. E. 642.

[146] Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661.

[147] Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477.

afterwards realized at private sale.[148] But since he is entitled to the entire security, his recovery is not to be reduced either by the value of other property held as security, or by the fact that the mortgagor is solvent,[149] nor by the fact that the proceeds were applied to other debts of the mortgagor.[150]

These rules may be affected by the existence of a junior mortgage. Where there is a mortgage senior to plaintiff's, the amount of his recovery cannot exceed the value of the property, less the amount of the senior mortgage.[151] Where the first mortgagee sues the second mortgagee for conversion, the extent of the recovery is the amount of plaintiff's claim.[152] And where the first mortgagee converts, and is sued by the second mortgagee, the measure of damages is the value of the second mortgagee's interest in the property.[153]

§ 497g. Conversion of property sold conditionally.

Where the title to goods sold has been reserved and the property partly paid for, the general rule is that the seller in an action for the conversion of the goods may recover the unpaid balance of the purchase price, with interest.[154] But where the entire right has revested in the seller, and he has an immediate right to take the goods, free from any claim whatever on the part of the buyer, he may recover the entire value of the goods converted. So on such a sale of a bicycle delivered to the buyer, on failure of the buyer to redeliver

[148] Hull *v.* Bernatz, 106 Mich. 551, 64 N. W. 473.

[149] Huellmantel *v.* Vinton, 112 Mich. 47, 70 N. W. 412.

[150] Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477.

[151] *Dakota:* Straw *v.* Jenks, 6 Dakota, 414, 43 N. W. 941.

Michigan: Huellmantel *v.* Vinton, 116 Mich. 621, 74 N. W. 1004.

[152] *Colorado:* Stanley *v.* Citizens' Coal & Coke Co., 24 Colo. 103, 49 Pac. 35.

Georgia: Harris *v.* Grant, 96 Ga. 211, 23 S. E. 390.

[153] Lovejoy *v.* Merchants' State Bank, 5 N. D. 623, 625, 67 N. W. 956.

[154] *Georgia:* Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648.

Maine: Town *v.* Harlam, 82 Me. 84, 24 Atl. 587.

Rhode Island: Woods *v.* Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773, 22 R. I. 225, 47 Atl. 211.

In *Georgia*, the vendor after obtaining a judgment against the vendee for the price, and collecting a portion of it, may maintain an action of bail trover for the purpose of collecting the balance of the purchase money, with interest. Jones *v.* Snider, 99 Ga. 276, 25 S. E. 668. *Cf.* Fussell *v.* Heard, 119 Ga. 527, 48 S. E. 621.

it on demand, after breach of the promise to pay, the seller may recover the entire value of the property.[155] If the condition fixes a time for payment, after the time has expired, the price not being paid, in an action brought by the seller against the attaching creditor of the buyer, the rule of damages is the value of the property at the time of the attachment.[156] This seems entirely clear under the rule that the general property remains in the vendor subject to be divested by performance of the condition. In this case the attempted enforcement of the creditor's right was based entirely on the erroneous idea that the plaintiff's interest was a mere lien. The case is entirely different where the vendee has acquired a special property, as where he has already paid part and the condition has not lapsed.[157]

This vital distinction, which runs through all the cases, seems to have been overlooked by the New York Court of Appeals in a recent case,[158] in which the seller after breach of condition was allowed to recover only the amount of the unpaid purchase-money. That court is undoubtedly entirely right in saying that the weight of authority is in favor of limiting the conditional seller to the amount unpaid, but this is on the assumption that part performance by the buyer has vested an interest in the latter. This is often the case where no time is fixed; but where a time fixed runs out, without any payment, nothing has vested in the buyer.

§ 498. Natural increase.

The natural increase of the property accruing before the conversion belongs to the owner, and he may recover compensation for the loss of it,[159] but he has no claim for increase after the conversion. Thus, where mares were converted, it was said by the Court of Common Pleas of Upper Canada: "If they had been in foal at the time of their wrongful conversion, that would form an ingredient in the estimate of their

[155] *Maine:* Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14.
New York: Gormully & Jeffery Mfg. Co. *v.* Catharine, 25 Misc. 336, 55 N. Y. Supp. 475.

[156] Buckmaster *v.* Smith, 22 Vt. 203.

[157] Rose *v.* Story, 1 Pa. 190.

[158] Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458, *n.*

[159] Arkansas V. L. & C. Co. *v.* Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. ed. 854.

value, but it would not give the plaintiff a right to recover independently for foals dropped after the conversion of the mares." [160] The question in such cases is, how far the claim is speculative.[161] When it can be proved in the sufficient certainty that, but for the conversion, the plaintiff would have had the increase, the claim seems warranted.

§ 499. Property increased in value by the defendant.

Where the property has been increased in value by the defendant, and the plaintiff attempts to get the benefit of the increase, the decisions are in conflict; some cases allowing recovery of the value of the property at the time it was taken, others allowing recovery of the full value. In the simplest case, the defendant has expended labor upon personal property after he got it into his possession. In this case, if the plaintiff has not lost his title to the property, he will often be allowed to follow the property and recover it. But by bringing the action of trover he demands damages for the conversion. By the conversion he was deprived of the property, and a claim for the value of it took its place; consequently, that value at the time of conversion, with interest, should be the limit of his recovery. It should make no difference that the plaintiff by another form of action might perhaps have obtained the property itself; having the choice, he chose to bring trover, and his damages must be measured by the principles applying to that action, if, as in this case, they afford full and equitable compensation. Nor should it make any difference in this action that the conversion was wilful, and the labor was bestowed upon the property with full knowledge of the facts.

This appears to be the principle generally adopted in the cases. Thus where goods were sent to a dyer,[162] who dyed them, and then insisted on a right to retain them, not only for the charges on them, but for a debt due for dyeing other goods, the Court of King's Bench held that he had no lien but

[160] Draper, C. J., in Scott *v.* McAlpine, 6 Up. Can. C. P. 302, 306.

[161] See Drenner *v.* Charles, 12 Pa. Super. Ct. 476 (conversion of cow); Kohai *v.* MacDonald, 9 N. Z. L. R. 221 (wool growing on lambs dropped after the conversion).

[162] Green *v.* Farmer, 4 Burr. 2214.

for the price of dyeing the particular goods, and the plaintiff recovered; but the report adds: "The price of dyeing was deducted at the time of taking the verdict, the value of the goods in white being only thereby given to the plaintiff." And the principle of this decision has been followed in Massachusetts, in a case where the plaintiffs made a conditional sale of brown cotton goods to a printing company, who, after printing them, transferred them to the defendant, but did not comply with the conditions; and it was held that the plaintiffs could recover in trover, but the court was of opinion "that the plaintiffs were not entitled to recover the full value of the goods in the printed state." The value of them in their brown state was taken as a more just and equitable measure of damages, under all the circumstances of the case.[163] So where the plaintiffs contracted with R. to build a ship for them, and made advances from time to time in respect of her; and R. gave them, as security for the advances, a bill of sale of the ship, which stated that he thereby did sell, transfer, etc., to the plaintiffs a certain ship in process of building (describing her), to have and to hold the ship, etc., to the plaintiffs forever, when she should be completed; the defendant having converted the vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor as special damage the value of freight which the plaintiffs might have earned with her if R. had completed her and delivered her to them.[164] Where the defendant took the plaintiff's logs at one place and transported them to another, the measure of damages is the value of the logs where they were taken.[165] So where the plaintiff's logs were sawed into

[163] Dresser Manuf. Co. *v.* Waterston, 3 Met. 9. In Alabama, where wood had been converted and made into coal by the defendant, the owner was held entitled to bring trover for the coal. As to the question we are now considering, it was said: "It is possible the jury might consider the value of the defendant's labor on the rough material;" but as this point had not been presented, it was not decided. Riddle *v.* Driver, 12 Ala. 590.

[164] Reid *v.* Fairbanks, 13 C. B. 692.

[165] *New Hampshire:* Beede *v.* Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426.

Pennsylvania: Hill *v.* Canfield, 56 Pa. 454.

boards by the defendant, the measure of damages should be the value of the logs, not of the boards.[166] Where yarn was converted by the defendant during the process of manufacture, the measure of damages was the value of the yarn, not the value of the finished product.[167] Indeed, it is difficult to see what other rule could be adopted consistently with the general principles of compensation. Any other rule would give the plaintiff more than compensation for his loss, which was a loss of the chattel unchanged by the labor of the defendant.[168]

It may be claimed for the plaintiff that he has a right to say at what time the conversion took place; and that he may therefore allege a conversion after the labor of the defendant had been expended upon the property. Thus in Final *v.* Backus,[169] where the plaintiff's logs were taken to a distant mill and there made into boards, it was held that the plaintiff could elect to treat nothing as a conversion until the logs were cut into boards, and the value of the logs at the mill was held to be the measure of damages. This supposed principle is based on the right of the plaintiff to retake his property by means of an action of replevin at any time until its form was so changed as to divest him of his title. But this right of the plaintiff should not change the measure of

Vermont: Tilden *v.* Johnson, 52 Vt. 628, 36 Am. Rep. 769.

So of ore: Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185. And of hay: Carpenter *v.* Lingenfelter, 42 Neb. 728, 60 N. W. 1022.

[166] Morton *v.* McDowell, 7 Up. Can. Q. B. 338. But *contra*, Eastman *v.* Harris, 4 La. Ann. 193 (*semble*); Baker *v.* Wheeler, 8 Wend. 505, 25 Am. Dec. 66; Rice *v.* Hollenbeck, 19 Barb. 664, where the taking seems not to have been in good faith. And in Stuart *v.* Phelps, 39 Ia. 14, where standing corn was wilfully converted, the defendant was obliged to pay its value *after he had husked and cribbed it*. These cases seem to have been influenced by the rule in the case of severance from the realty, *infra*.

[167] Aborn *v.* Mason, 14 Blatch. 405. The market value of the yarn as such was not given, but the value of the cloth less the cost of finishing it; that is, the value of the yarn *on the frames* as it was at the time of conversion.

[168] In Hendricks *v.* Evans, 46 Mo. App. 313, plaintiff was allowed to recover the value of a horse, only on the condition he was in at the time of the demand, not as improved by defendant's care. For an action for the conversion of mortgaged cotton, defendant was allowed his rent and expenses incident to gathering and preparing the cotton for market. McDaniel *v.* Staples, 113 S. W. 596. *Cf.* Walthur *v.* Wetmore, 1 E. D. Smith, 7, and cases cited.

[169] 18 Mich. 218; *acc.*, Everson *v.* Seller, 105 Ind. 266, 4 N. E. 854.

damages; for the principles upon which damages are given are quite distinct from the principles governing the protection of property. When the property is taken from the plaintiff by the tort, its place is taken by a right to compensation of equal value. If after that the plaintiff by accretion or otherwise becomes entitled to claim his property as enhanced in value by the results of the defendant's labor, that fact does not affect the right to compensation for the conversion, a right which accrued before the labor was performed.[170] Indeed, even in an action of replevin the rule seems to be that the innocent trespasser is to be allowed compensation for his labor.[171]

But where the labor of the defendant was of no value to the owner, he is entitled to no consideration. Thus where the wrongdoer bestowed labor in securing and transporting the property, and thereby increased its value, yet if the owner could and would have done the same thing without cost to himself he may recover the entire value at the place to which it was carried, without deducting the cost of transportation.[172]

§ 500. Severance from the freehold.

Where the property is severed from the freehold the conversion takes place after the labor has been expended upon the property, and the value of the property at the time of its conversion includes the labor. The amount of recovery in an action of trover would therefore seem at first sight to be the value of the property after the labor has been expended upon it.

There are, however, certain facts to be considered which tend to modify the general rule in this case. In the first place, this rule results in the recovery of a greater amount than actual compensation, for the owner is enabled to secure the whole

[170] See to this effect, Gates *v.* Rifle Boom Co., 70 Mich. 309, 38 N. W. 245.

[171] § 534. The case of Isle Royale Mining Co. *v.* Hertin, 37 Mich. 332, 26 Am. Rep. 520, seems at first sight opposed to this view; there the plaintiff carried the defendant's wood to the landing, where the defendant took possession of it; and the plaintiff was refused compensation for his labor in an action of trover. But there is in that case an important distinction, that is, the defendant could not get his wood, to which he had a right, without availing himself of the plaintiff's labor.

[172] Taber *v.* Jenny, Sprague, 315.

benefit of the defendant's labor. In the second place, although the defendant's wrongful act was in reality a trespass upon real estate, the plaintiff recovers a greater amount than the damage to the realty, and a greater amount than he could recover in an action of trespass, unless indeed (as is the case in a few jurisdictions) he is allowed to recover in the action of trespass the full amount the technical rule would give him in an action of trover.[173] Still further, where the distinction between the forms of action is abolished, as is very generally the case, and the plaintiff recovers upon the case stated in his pleadings, since he could gain no advantage from the form of action, he should clearly be entitled only to actual compensation, though he alleged a conversion. As we shall see, the result of these considerations has been a great conflict of authority.

§ 501. The rule in England.

The rule which was at first adopted in England allowed the plaintiff in all cases to recover the value of the property at the time of the conversion, that is, after it was severed from the soil. This was laid down in a case in the English Exchequer,[174] and the doctrine of this case was recognized in the Queen's Bench.[175] But in the case of Wood *v.* Morewood where a similar trespass was complained of, Parke, B., at Nisi Prius, told the jury that if there was fraud or negligence on the part of the defendant, they might give as damages under one of the counts, which was in trover, the value of the coals at the time they first became chattels, on the principle laid down in Martin *v.* Porter; but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff; which latter estimate was adopted by the jury.[176] This conflict of opinion continued for some time,[177] but the rule laid down by Baron Parke in Wood *v.* Morewood was finally adopted in Chan-

[173] For the rule in an action of trespass *quare clausum*, see the chapter on Injuries to Real Property.

[174] Martin *v.* Porter, 5 M. & W. 352.

[175] Morgan *v.* Powell, 3 Q. B. 278.

[176] Wood *v.* Morewood, 3 Q. B. 440, *n.*

[177] See Hilton *v.* Woods, L. R. 4 Eq. 432; Llynvi Co. *v.* Brogden, L. R. 11 Eq. 188.

cery,[178] and by the House of Lords in the case of Livingstone *v.* Rawyards Coal Co.,[179] a Scotch appeal.

§ 502. Technical rule followed in some jurisdictions.

The technical rule, allowing recovery of the whole value of the property after its severance, was at first followed in this country. So in New York,[180] where certain logs had been cut on the plaintiff's land, drawn to the defendant's mill, and converted into boards (the value of the logs being $187.56; of the boards, $309.46, and the difference, $121.90); and the judge charged that the measure of damages would be the value of the boards without reference to the price of the defendant's labor, and the jury gave $309.46. It was insisted, on a motion for a new trial, that in trover, where the conversion was the gist of the action, and the character of the original taking not inquired into, the damages should be confined to the value of the thing as taken, or the value of the defendant's labor deducted; and that even if the rule laid down at the trial were sound in *trespass*, it could not apply here, because the plaintiff had elected to bring trover. The court held otherwise, on the authority of previous cases. But Sutherland, J., dissented. He admitted that where the taking was *wilful and tortious*, this rule would not be oppressive or unjust. But that as the mode of taking could not, in trover, be inquired into, no such general rule could be laid down. He put the case of jewels lodged with a banker for safe custody, and pawned by him, and set at great expense by the pawnee; could the rightful owner in trover against the pawnee obtain the jewels as set, without deduction for the labor of setting? But a new trial was denied.

This rule has been followed in several jurisdictions in this country. So it is held, in the case of coal wrongfully mined, that the measure of damages is the value of the coal at the pit's mouth, less the expense of bringing it there, but allowing nothing for the expense of mining; [181] and in the case of timber wrongfully cut, that the measure of damages is the value of

[178] Jegon *v.* Vivian, L. R. 6 Ch. 742.

[179] 5 App. Cas. 25, 39.

[180] Brown *v.* Sax, 7 Cow. (N. Y.) 95.

[181] *United States:* Cheeney *v.* Nebraska & C. S. Co., 41 Fed. 740.

Alabama: Ivy C. & C. Co. *v.* Alabama C. & C. Co., 135 Ala. 579, 33 So. 547.

the logs just after they are felled.[182] So in Indiana it was held in an action for the conversion of wheat, of which the defendant had forcibly taken possession, as it stood in his field, that proof of the value of the defendant's labor in harvesting and threshing the crop, for the purpose of reducing the damages, had been erroneously admitted.[183] In Winchester *v.* Craig,[184] an action for the conversion of timber, by cutting it by mistake from the land of the plaintiff, it was said that the jury could fix the measure of damages either at the value when taken, together with profits that might have been derived in the ordinary market, or the market value at the place where it was tortiously sold by the defendant, less his expenses in the transportation and preparation for sale, with interest from the date of the conversion. In some jurisdictions the rule is held to be different according to the form of action; the plaintiff in trover being allowed the whole value of the property, as increased by the defendant's labor, while in trespass he is confined to the damage done to the realty.[185] While under this rule the cost

Illinois: McLean C. C. Co. *v.* Long, 81 Ill. 359; McLean C. C. Co. *v.* Lennon, 91 Ill. 561, 33 Am. Rep. 64.

Maryland: Franklin C. Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280; Blaen Avon C. Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560.

The amount to be deducted from the value at the pit's mouth is not what the defendant spent in getting it there, but what it would have cost the plaintiff. *In re* United Merthyr Collieries Co., L. R. 15 Eq. 46.

[182] *United States:* Bly *v.* U. S., 4 Dillon, 464.

Alabama: White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199.

Florida: Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Georgia: Milltown L. Co. *v.* Carter, 3 Ga. App. 344, 63 S. E. 270.

Maine: Moody *v.* Whitney, 38 Me. 174, 61 Am. Dec. 239.

Michigan: Winchester *v.* Craig, 33 Mich. 205, 5 Am. Rep. 189.

New Hampshire: Beede *v.* Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426.

[183] Ellis *v.* Wire, 33 Ind. 127; *acc.*, Foley *v.* Southwestern Land Co., 94 Wis. 329, 68 N. W. 994.

[184] 33 Mich. 205, 5 Am. Rep. 189.

[185] *Alabama:* White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199.

Colorado: Omaha G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185.

Florida: Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

New Hampshire: Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151.

But in other jurisdictions the rule in trespass is the same as in trover:

Georgia: Smith *v.* Gonder, 22 Ga. 353.

Illinois: Illinois & St. L. R. R. *v.* Ogle, 82 Ill. 627, 25 Am. Rep. 342.

New York: Firmin *v.* Firmin, 9 Hun, 571.

North Carolina: Bennett *v.* Thompson, 13 Ired. L. 146.

of severance accrues to the owner, the same is not true of expense subsequently incurred. The measure of damages is the value of the chattel at the moment of severance, at least in case of an innocent trespass; the additional value given it by change of form [186] or by transportation to market [187] cannot be recovered.

§ 503. Defendant generally allowed value of his labor.

But by the prevailing view the defendant, if he acted in good faith, is allowed the value of his labor; that is, the measure of damages is the value of the property as it was just before the defendant's wrongdoing began.

The leading case upon the subject in this country is Forsyth *v.* Wells,[188] which was decided before the present rule was established in England. That case was an action of trover for mining and carrying away coal from the plaintiff's lands. On the trial, the Court of Common Pleas, having decided against the argument of the defendant that trover would lie, held further that the measure of the plaintiff's damages was not simply the value of the coal in the ground, but its value after it had been "dug," or what was called "knocked down," the difference having been about as one to eight. On error the Supreme Court agreed that the action was properly brought, since the defendant below, as it appeared, had not claimed a line which would include the coal taken out, but had gone beyond the proper limit by mistake. But the court sent the case back for a new trial, on the ground that the measure of damages should have been the same as in trespass for mesne profits, and that if, as the jury appeared to have found, the defendant below had been guilty of no intentional wrong, he ought to have been charged, not with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land "as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits."

[186] Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386.

[187] *Florida:* Wright *v.* Skinner, 34 Fla. 453, 463, 16 So. 335.

New Hampshire: Beede *v.* Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426.

[188] 41 Pa. 291, 294.

This case is generally followed. So in trover for wrongfully mining ore or coal, the measure of damages is the value of the ore or coal *in situ;* [189] for cutting trees, the value of the trees standing,[190] often measured by the difference in value of the land before and after cutting.[191] But this applies only when the defendant's trespass was in good faith. Where he knowingly converted property severed from the plaintiff's land, there can be no allowance for the expense of severing it.[192] Where a railroad company rightfully made a cut through the plaintiff's land, thereby excavating coal, and wrongfully sold the coal, the measure of damages was the value of the coal at the time of the sale.[193] This differs from the cases just considered. Technically, there was no wrongdoing till the sale, consequently compensation must be estimated at that time. As a matter of justice, the labor should not be deducted from the recovery because it was performed by the defendant for his own benefit, in making the cut.

[189] *California:* Goller *v.* Fett, 30 Cal. 481.

Iowa: Chamberlain *v.* Collinson, 45 Ia. 429.

Massachusetts: Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

Mississippi: Illinois Cent. R. R. *v.* LeBlanc, 74 Miss. 626, 21 So. 748.

Montana: Maloney *v.* King, 30 Mont. 158, 76 Pac. 4.

Nevada: Waters *v.* Stevenson, 13 Nev. 157.

Pennsylvania: Irwin *v.* Nolde, 176 Pa. 504, 35 Atl. 217.

Tennessee: Coal Creek M. & M. Co. *v.* Moses, 15 Lea, 300, 54 Am. Rep. 415.

So of oil: Dyke *v.* National Transit Co., 22 App. Div. 360, 49 N. Y. Supp. 180.

Cf. Colorado C. C. M. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128.

[190] *Michigan:* Thompson *v.* Moiles, 46 Mich. 42, 8 N. W. 577; Gates *v.* Rifle Boom Co., 70 Mich. 309, 38 N. W. 245; Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

Minnesota: Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Mississippi: Heard *v.* James, 49 Miss. 236 (*semble*).

Nevada: Ward *v.* Carson R. W. Co., 13 Nev. 44.

New Hampshire: Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151.

New York: Whitbeck *v.* New York C. R. R., 36 Barb. 644; Clark *v.* Holdridge, 12 App. Div. 613, 43 N. Y. Supp. 115.

Tennessee: Ross *v.* Scott, 15 Lea, 479.

Vermont: Tilden *v.* Johnson, 52 Vt. 628, 36 Am. Rep. 769.

[191] Chipman *v.* Hibberd, 6 Cal. 162.

[192] *United States:* Wooden Ware Co. *v.* U. S., 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. 398; Cheeney *v.* Nebraska & C. S. Co., 41 Fed. 740; United States *v.* Teller, 106 Fed. 447, 45 C. C. A. 416.

Pennsylvania: Foster *v.* Weaver, 118 Pa. 42, 12 Atl. 313, 4 Am. St. Rep. 573.

[193] Lyon *v.* Gormley, 53 Pa. 261; *acc.,* Genet *v.* Delaware & H. C. Co., 14 App. Div. 177, 43 N. Y. Supp. 589. *Cf.* Lehigh V. C. Co. *v.* Wilkesbarre & E. R. R., 187 Pa. 145, 41 Atl. 37.

§ 504. Damages recoverable from purchaser.

Where a wanton trespasser severs property from the soil and sells it to the defendant, the measure of damages is the whole value of the property at the time of the sale.[194] In several jurisdictions it has been held or intimated that no more can be recovered from the purchaser than from the original trespasser, and if the original trespass was *bona fide* the plaintiff may recover from the purchaser only the value *in situ* or immediately after severance, according to the rule prevailing in the particular jurisdiction.[195] But in other jurisdictions it is held that the rule should be applied in all cases, irrespective of the good faith of the defendant himself;[196] on the ground that the defendant committed a tort at the time of purchase, and should pay compensation for that tort, not for the earlier tort of the trespasser, and that if the other rule were adopted it would in some way enure to the benefit of the undeserving trespasser. Of course if the purchaser had knowledge of the

[194] *Arkansas:* Central Coal & C. Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Maine: Powers *v.* Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304.

Minnesota: Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 43 N. W. 476.

Tennessee: Godwin *v.* Taenzer, 122 Tenn. 101, 119 S. W. 1133.

Where X., under a contract to purchase logs from the plaintiff, took the logs and sold them to defendants, with an agreement that the title should pass at the time of sale, but that X. should manufacture them into lumber, and advances were made by the defendants in good faith at the time the logs were skidded, it was held that, defendants being innocent purchasers, the measure of damages should be fixed at the time when they made the first advances, that is, at the time the logs were skidded, and should not include the subsequent increase in value by the logs being cut into lumber. Fisher *v.* Brown, 70 Fed. 570, 17 C. C. A. 225.

[195] *Arkansas:* Central Coal & C. Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49 (*semble*).

Colorado: Omaha & G. S. & R. R. Co. *v.* Tabor, 13 Colo. 41, 56, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Minnesota: Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896 (*semble*).

Ohio: Railway Co. *v.* Hutchins, 32 Oh. St. 571, 30 Am. Rep. 629.

Ontario: Smith *v.* Baechler, 18 Ont. 293 (*semble*).

[196] *United States:* Wooden Ware Co. *v.* United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. 398; United States *v.* Hielner, 11 Sawy. 406.

Georgia: Parker *v.* Waycross & F. R. R., 81 Ga. 387, 8 S. E. 871.

Maine: Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

Michigan: Tuttle *v.* White, 46 Mich. 485, 9 N. W. 528, 41 Am. Rep. 175; Saltmarsh *v.* Chicago & G. T. Ry., 122 Mich. 103, 80 N. W. 981.

Wisconsin: Tuttle *v.* Wilson, 52 Wis. 643, 9 N. W. 822.

trespass he would in any jurisdiction be held responsible for the entire value of the chattel at the time he bought it.[197]

§ 505. Confusion.

* The action of trover, as well as that of trespass, often presents interesting questions connected with what is technically termed confusion.[198] "If," says Blackstone,[199] "one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent." [200] **

In Maine this doctrine of confusion of goods has been applied to a case where the defendant had taken the plaintiff's logs, and manufactured them into boards, and intermixed these boards with a pile of his own, so that they could not be distinguished, with the *fraudulent* intent of depriving the plaintiff of his property. And it was held that the owner of the logs might maintain replevin for the whole pile.[201] If, however, the mixture be accidental or not wrongfully made, each party will be entitled to his own property or to its value, provided the separation can be made, or the values be apportionable. If by the intermixture the property be destroyed, the loss falls on him whose fault occasioned the destruction.[202]

* The civil law does not in any case appear to recognize the severe rule of our system: *Quod si frumentum Titii frumento tuo mistum fuerit, siquidem voluntate vestrâ, commune est, quia singula corpora, id est, singula grana, quæ cujusque propria fuerint, consensu vestro communicata sunt. Quod si casu id mistum fuerit, vel Titius id miscuerit sine tuâ voluntate, non*

[197] Smith *v.* Bacchler, 18 Ont. 293.

[198] Confusion, Lat. *Confusio. Confundi dicitur, quod aliis ita commiscetur ut deduci et se parari non possit, aut certe difficilis sit ejus separatio. Vicat. Vocab. Utriusque Furis in voc.* The term is applied also to the merger of different interests, and in this sense the analogous word is used in the French law.—*Crivelli, in voc.*

[199] 2 Comm., ch. 26, p. 405.

[200] *Anon.*, Popham, 38, pl. 2; Warde *v.* Aeyre, 2 Bulst. 323. See Stephenson *v.* Little, 10 Mich. 433.

[201] Wingate *v.* Smith, 20 Me. 287.

[202] Ryder *v.* Hathaway, 21 Pick. (Mass.) 298.

videtur commune esse, quia singula corpora in suâ substantiâ durant. Sed nec magis, istis casibus, commune sit frumentum quam grex intelligitur esse communis, si pecora Titii tuis pecoribus mista fuerint.[203] Nor should the analogous case in regard to real property be overlooked. In trespass for mesne profits, the *bona fide* occupant of lands without notice, who has improved them, is allowed to set off or recoup the value of his improvements.** Why should not the same equity be extended to this case?

It is clearly necessary to protect the innocent party; and so far as that requires the title to the entire mass to be put in him it must be done. When the goods cannot be identified, even if the mixture was an innocent one, the owner is entitled to the entire mixture, but only until he recovers the value of his own property.[204] Where, however, the elements of the mixture are distinguishable, the owner is entitled to his own property only, and has no claim upon the entire mass.[205]

§ 506. Consequential and special damages.

It was suggested [206] by Parke, B., at Nisi Prius, that the plaintiff could recover special damages if laid in the declaration; as in trover for the conversion of a horse, that the plaintiff could recover for money paid for the hire of other horses. And it has been so since decided by the Queen's Bench, in trover brought by a carpenter for his tools; the declaration containing an allegation, that by reason of the conversion the plaintiff was prevented from working at his trade.[207] In this country, it has been doubted; the doubt arising from the technical form of the action, as well as from the question as to remoteness.[208] It is hardly necessary to say that, wherever special damages

[203] Inst. lib. ii, tit. i, § 28. A different rule necessarily prevailed where separation was impossible. *Sed et id quod in charta mea scribitur aut in tabula pinxitur, statim meum fit; licet de pictura quidam contra senserint propter pretium picturæ; sed necesse est ei rei cedi quod sine illa esse non potest.* Dig. lib. vi, De Rei Vindi, p. 23, § 3.

[204] *Iowa:* Alger *v.* Farley, 19 Ia. 518.

Maryland: Gittings *v.* Winter, 101 Md. 194, 60 Atl. 630.

North Carolina: Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

[205] McKnight *v.* United States, 65 C. C. A. 37, 130 Fed. 659.

[206] Davis *v.* Oswell, 7 C. & P. 804.

[207] Bodley *v.* Reynolds, 8 Q. B. 779.

[208] *Connecticut:* Hurd *v.* Hubbell, 26 Conn. 389; Seymour *v.* Ives, 46 Conn. 109.

are allowed, the special damage demanded must be distinctly alleged in the declaration.[209]

The case of Bodley *v.* Reynolds was followed in Reilley *v.* McMinn.[210] This was an action for the conversion of a blacksmith's tools; the blacksmith being unable to procure other tools, owing to his remote situation, was thrown out of employment. It was held that the jury might consider this in addition to the value of the tools. So in Shotwell *v.* Wendover,[211] the court said the plaintiff has a right to claim damages for the use of the articles (tools, etc.), and for their deterioration while in the possession of the defendant. In Stollenwerck *v.* Thacher [212] it appeared that the plaintiffs had sent certain goods to G. for sale. G. was to receive a certain commission on the sales. G. sold them to the defendant without requiring cash payment, as he had been ordered to do. In trover against the vendee, it was held that the damages should not include a commission to G. for the sale, because the plaintiff was not obliged to allow G. a commission for doing an act which was not shown to have been for the interest or according to the intent of the plaintiffs. In Leffingwell *v.* Gilchrist,[213] an action for the conversion of a file of the newspaper of which the plaintiff was editor, evidence of the inconvenience an editor would suffer from the destruction of a file of his newspaper was excluded. In France *v.* Gaudet [214] it appeared that the plaintiff had bought champagne at fourteen shillings per dozen, and resold it at twenty four-shillings to the captain of a ship about to leave England. The defendant, at whose wharf the wine was lying, refused to deliver it, and the plaintiff

Missouri: Saunders *v.* Brosius, 52 Mo. 50.

New York: Brizsee *v.* Maybee, 21 Wend. 144.

Pennsylvania: Farmers' Bank *v.* McKee, 2 Pa. 318.

[209] Moon *v.* Raphael, 2 Bing. N. C. 310; Tindall, C. J., said: "The injury of which the plaintiffs complain not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action of trover, ought at least to have formed the subject of a special allegation."

[210] 2 Pugs. (N. B.) 370.

[211] 1 Johns. (N. Y.) 65.

[212] 115 Mass. 224.

[213] 40 Ia. 416.

[214] L. R. 6 Q. B. 199, 204. *Cf.* Avery *v.* Catlin, 12 Wash. 322, 41 Pac. 55, where a contract of sale had been made which was put an end to by a wrongful attachment. The contract price was taken as the value of the goods.

could not fulfil the contract, there being no other champagne in the market of the same quality. It was held that the plaintiff was entitled to recover the price at which he had sold the champagne. Mellor, J., in delivering the opinion of the court, and in reference to the argument of the defendant's counsel, that "in analogy to the cases of special damages arising out of the breach of contract, notice of the special circumstances ought to have been given to the defendants, in order to entitle the plaintiff to recover anything beyond the ordinary value of the goods converted," used the following language:

"We are not prepared to say that there is any analogy between the case of contract alluded to, in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract, special damages reasonably resulting from the breach of it may be considered within the contemplation of the parties. In case of trover, it is not in general special damage which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrongdoer could then *affect the value,* although it might affect his conduct; but upon what principle is a notice necessary to a man who *ex hypothesi* is a wrongdoer? In such a case as the present, the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from their rightful owner, who thereby sustains 'an actual present loss,' which appears to us to be a convertible term with 'actual value.' "

§506a. Proximate and remote damages.

The line of distinction which runs through the cases, separating those in which consequential damages are refused from those in which consequential damages, if specially alleged, are allowed, is the same which runs through the whole field of consequential, as distinguished from direct, damages in tort; that is, the cases are governed by the general principle that proxi-

mate damages may be recovered, while remote damages may not.

Thus in Cernahan *v.* Chrisler [215] it is said:

"It is true that in actions for conversion of property the measure of damages is generally the value of the property at the time and place of the conversion, with interest; but when the circumstances show special damage over and above the value of the property, the almost universal current of authority is that such damage may be recovered in such action." And it is added that in case the property is returned, in the absence of evidence showing special damage, the recovery must be limited to nominal damages. So, in an action for taking and converting, the proof must show the value of the property taken, or that the plaintiff sustained some special damage, in order to entitle him to recover more than nominal damages.[216] In Massachusetts, in an action for conversion of plumbing fixtures wrongfully taken from a house which was being built to be let to tenants, it was held that the plaintiff might recover the rental value of the house during the delay in completion caused by the removal of the fixtures.[217] In an action for converting a ship, plaintiff can recover special damages beyond the value of the property.[218] And in an action for seizing a mortgaged horse, it was held in North Carolina that plaintiff was not entitled to damages for the suffering he endured from cold on the trip home; as the court very justly observes, such special or consequential damages as these would not be recoverable in any sort of action.[219]

To begin with cases excluding consequential damages, it has been held that in trover by the vendee, the profits which might have been made by the use of the chattel, or loss from incapacity to employ men and horses by reason of its detention, are speculative.[220] Where a vessel was converted by the defendants before she was finished, and they having afterwards finished her, the plaintiffs were not allowed to recover as a special

[215] 107 Wis. 645, 83 N. W. 778.

[216] Lay *v.* Bayles, 4 Cold. (Tenn.) 246.

[217] Munroe *v.* Armstrong, 179 Mass. 165, 60 N. E. 475.

[218] Spanish & P. S. S. S. Co. *v.* Bell, 34 Eng. L. & Eq. 178.

[219] Hinson *v.* Smith, 118 N. C. 503, 24 S. E. 541.

[220] Farmers' Bank *v.* McKee, 2 Pa. (2 Barr) 318.

damage the value of freight which they might have earned with her.[221] In an action for the wrongful sale of tools which were exempt, plaintiff tried to recover on the ground of his having a contract to build certain bridge pillars, of which the attaching officer had no notice. It was held that he could not recover.[222] In an action for conversion, plaintiff claimed expenses incurred by him in recovering the property. The property was not in fact recovered. It was held that his damages could not exceed the actual value of the property, with interest.[223] In an action by the maker for conversion of a note, the plaintiff cannot recover costs of unsuccessful defence to note in the hands of holder.[224] In California, and perhaps in some other States, the Code provides that the detriment caused by the wrongful conversion of personal property is presumed to be, among other things, a fair compensation for the time and money properly expended in the pursuit of the property.[225] This provision is held not to authorize the recovery of attorneys' fees.[226] On the other hand, under a statute providing that damages for wrongful conversion shall include a fair compensation for the time and money properly expended "in pursuit of the property," attorney's fees paid out in recovering money lost through the fraud of another agent (the principal being liable), are recoverable as an element of compensatory damages against the principal.[227] In Vermont, in an action of trover, the plaintiff may recover the actual damage caused him by the defendant's wrongful conduct in respect to the property, but the expenses of the suit, beyond taxable costs, cannot be included in this. Damage outside the ordinary measure can be recovered only by special action on the case or by special averments in the declaration.[228]

In the following cases, on the other hand, the right to recover is recognized under the general principle stated above:

[221] Reid *v.* Fairbanks, 13 C. B. 692, 24 Eng. L. & Eq. 220.

[222] McKnight *v.* Carmichael, 7 Tex. Civ. App. 270, 27 S. W. 150.

[223] United States *v.* Pine River L. & I. Co., 89 Fed. 907, 32 C. C. A. 406.

[224] Dean *v.* Nichols & Shepard, 95 Ia. 89, 97, 63 N. W. 582.

[225] Inzaga *v.* Villaba, 85 Cal. 191, 24 Pac. 656.

[226] Nicholls *v.* Mapes, 1 Cal. App. 349, 82 Pac. 265.

Contra, Bank of Palo Alto *v.* Pac. P. T. C. Co., 103 Fed. 841.

[227] Bank of Palo Alto *v.* Pacific P. T. C. Co., 103 Fed. 841.

[228] Park *v.* McDaniels, 37 Vt. 594.

In an action of trover for a slave, brought by the administrator of an estate, damages have been given to the amount of the value of the slave and her descendants, together with damages for their detention for the time of demand and refusal.[229] In Wisconsin, plaintiff is allowed the reasonable expenses of seeking to recover the property.[230] In an action for the conversion of grain, time and money expended in pursuit thereof was allowed under the California Code.[231] In a case in Missouri, the innocent agent of a thief sold plaintiff's cattle. Plaintiff recovered them in replevin from the vendee. In an action of trover plaintiff was allowed the expenses of getting the cattle back by means of the action of replevin.[232] In Texas, in an action for the conversion of a wagon, the value of the wagon, and also the value of its use up to the time of trial, was allowed.[233] In New Jersey, in an action for the conversion of a railroad ticket taken up by the conductor after public altercation with passenger, it was held that the plaintiff could recover damages for the indignity and ignominy.[234] Where damages of this sort are claimed, they must be properly alleged.[235]

§ 506b. Avoidable consequences.

In the action for conversion as elsewhere, the rule of avoidable consequences will be applied in proper cases. Thus, when animals are not killed nor so injured as to be worthless for food, the owner will be expected to dispose of them to the best advantage. He cannot abandon them wantonly and then claim their full value.[236]

[229] Fishwick *v.* Sewell, 4 Har. & J. (Md.) 393.

[230] Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191. See remarks of the court at page 343 on the decision in Collins *v.* Lowry, 78 Wis. 329, 47 N. W. 612.

[231] Lothrop *v.* Golden (Cal.), 57 Pac. 394.

[232] Laughlin *v.* Barnes, 76 Mo. App. 258.

[233] Moore *v.* King, 4 Tex. Civ. App. 397, 23 S. W. 484.

[234] Harris *v.* Delaware, L. & W. R. R., 77 N. J. L. 278, 72 Atl. 50.

[235] Fish *v.* Nethercutt, 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892.

[236] Illinois C. R. R. *v.* Finnigan, 21 Ill. 646.

CHAPTER XXII

THE RULE OF HIGHER INTERMEDIATE VALUE

§ 507. Higher intermediate value.
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§ 507. Higher intermediate value.

It has been held by many courts of high authority that in actions for the conversion, not only of stock, but of any personal property of fluctuating value, the measure of the damages is the highest market price which the property may have had from the date of the conversion to the end of the trial, provided the action be brought and pressed with due diligence. The same rule is also applied by these courts in other actions, namely, in actions of detinue and replevin, in actions for refusal to transfer or to deliver stock in corporations, and in actions for refusal by the vendor to deliver goods, the price of which has been paid in advance. It is impossible to consider the application of this rule in actions for conversion apart from its application in other forms of action. The rule will therefore here be discussed generally.

It is to be understood that even in jurisdictions in which the

rule of higher intermediate value is recognized, it is subordinate to the general principle of compensation. Thus, in the case of a detention of personal property through a levy of attachment, where the plaintiff demands the highest price obtainable during the period of detention, the defendant may show that within thirty days after its return, and while plaintiff still held it, and before the action was brought, the property had as high a market value, and its sale had been as possible as during the detention.[1]

§ 508. English cases.

The early English cases can hardly be said to have established any definite rule. The leading case [2] was on a writ of inquiry to assess damages on a bond given by the defendant, conditioned to replace, on the 1st of August, 1799, a quantity of stock lent him by the testator. The only question was whether the damages should be calculated at the price of the stock on the 1st of August, or at the price on the day of trial; and the latter sum was held the true rule of damages. Grose, J., said: "The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement." It was objected to this rule by counsel that it gave the plaintiff the power either by hastening or delaying his suit to take advantage of the rise in the market, without any risk in case of a fall. And Lawrence, J., said: "Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time, would not a court of equity compel the party to replace it at the then price of the stock, if the market had risen in the meantime?"

But in a later case in the Court of Exchequer,[3] the defendants, in 1833, agreed to sell and deliver, on board the plaintiff's vessel, a certain quantity of Odessa linseed, at that place, at 30*s.* per quarter. The plaintiff's vessel arrived at Odessa, and they paid the defendants £1,575 in October, 1833, being a moiety of the purchase-money of the expected cargo. The defendants

[1] Hoyt *v.* Fuller, 104 Fed. 192, 43 C. C. A. 466.

[2] Shepherd *v.* Johnson, 2 East, 211.

[3] Startup *v.* Cortazzi, 2 C. M. & R. 165.

gave notice that they could not comply with the contract. In February, 1834, when the cargo would have arrived in England if it had been delivered to the plaintiffs at Odessa, the price was from 47*s*. to 50*s*. per quarter; at the time of trial it would have been about 56*s*. The defendants paid into court, in September, 1835, £2,072, which was at the rate of 47*s*., and which was paid over to the plaintiffs, who contended that, as they had paid a portion of the purchase-money and lain out of it for a long time, they were entitled to damages according to the price at which the seed was selling at the time of the trial. Lord Abinger, at the trial, charged: "That in his opinion the plaintiffs were not entitled to treat this as a case resembling contracts for the replacing of stock where the damages are estimated at the price of the funds, and they were not entitled to damages according to the then price of the seed, and that taking the price at the time the cargo would arrive, it appeared to him that enough had been paid into court; but with these observations he left the case to the jury for their deliberation," who, designing, as Lord Abinger remarked, to give no more than the *money advanced and interest on it*, found a verdict for the defendants. A motion was made for a new trial, on the ground of misdirection; but the rule was discharged.

In another case,[4] of a bond to retransfer stock, the same principle was laid down. It was contended for the plaintiff, that he was entitled, at his option, to the best of three prices: either the value of the stock on the day fixed for the transfer; or, secondly, the price at the day of trial; or, thirdly, the highest price which the stock had borne between the day of delivery and the day of trial. But the court held, on the particular circumstances of the case, that the third claim could not be sustained. It seems difficult, however, in reason, to say why, if the plaintiff is entitled to a subsequent rise, provided it maintain itself to the day of trial, he should be prejudiced by a fall that may be due only to the delays of litigation.

Two later decisions in the English books held substantially the same doctrine. In an action on a bond conditioned to replace stock at a particular day, the defendant not having replaced it, Lord Ellenborough held, at Nisi Prius, that the

[4] M'Arthur *v.* Seaforth, 2 Taunt. 257.

plaintiff was entitled to claim according to the value upon the day of the trial.[5] In an action on a bond to replace stock, Best, C. J., at Nisi Prius, held that the price of the stock should be taken as at the time of the trial, saying:

"When the defendant had the money, he promised to restore the stock. Justice is not done if he does not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is, that the defendant has effectually prevented him from doing so." [6]

The subject was again examined, and the rule adhered to in Owen *v.* Routh.[7]

In a case of detinue for railway shares, the plaintiff demanded the shares on the 17th of May, 1845, when they were worth £3 5*s.* per share, and they were not delivered till the 25th of November of the same year, when they had fallen to £1. The measure of damages was held to be the difference between these two sums.[8]

These cases left the English law in an unsettled state; and it seems still to remain undetermined.[9] It is, however, beyond doubt that in actions for non-delivery of corporate stock the value at the time of trial may be recovered.[10] But in an action against a corporation for refusal to transfer stock on its books, the measure of damages is the value of the stock at the time it should have been transferred, with interest.[11] The distinction, if any there is, between these cases is a very unsatisfactory one. In actions for the conversion of chattels of a fluctuating value the general rule seems to be established, and the value at the time of conversion is the measure.[12]

§ 508a. No invariable rule in England.

The most important point to be gathered from the English

[5] Downes *v.* Back, 1 Stark. 318.

[6] Harrison *v.* Harrison, 1 C. & P. 412.

[7] 14 C. B. 327.

[8] Williams *v.* Archer, 5 C. B. 318; Archer *v.* Williams, 2 Car. & Kir. 26.

[9] Mayne on Damages, 8th ed., p. 220.

[10] Ibid., p. 220; Owen *v.* Routh, 14 C. B. 327.

[11] *In re* Bahia & S. F. Ry., L. R. 3 Q. B. 584.

[12] Mercer *v.* Jones, 3 Camp. 477; Loder *v.* Kekulé, 3 C. B. (N.S.) 128. But *contra*, Greening *v.* Wilkinson, 1 C. & P. 625.

cases seems to be that the measure of damages is regarded as very much at large, and dependent upon the particular circumstances of the case, and that there is no unalterable rule of the highest market value between the date of conversion or breach, and that of trial. When the action is one of contract, the terms of the contract become of the utmost importance, and in the case of a continuing contract, the right of the plaintiff may be to the value of the stock during a certain period of time, which may not embrace the time of action brought or trial at all. In Michael *v.* Hart,[13] the contract was to carry stocks over to a fortnightly settlement on the stock exchange. Wills, J., below, was of opinion that the plaintiff was entitled to the highest prices which were obtainable during the period during which "*he had the option of selling*" (*i. e.* under the contract), while on appeal it was held that at least the prices at the end of the settlement ought to govern.

§ 509. New York cases.

The question has been elaborately considered in New York. The leading case adopting the rule of higher intermediate value is Romaine *v.* Van Allen,[14] an action for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. In this case, which was decided in 1863, Mr. Justice Rosekrans, delivering the opinion of the court, said: "Independent of the authorities, the rule appears to me to be reasonable and necessary to protect the rights of the owners and pledgors of stock against the tortious acts of pledgees, if the plaintiff commences his action within a reasonable time after conversion, and prosecutes it with reasonable diligence." The reasoning, however, on which the decision is based, applies broadly to all cases of the conversion of chattels, the learned justice using the following language: "Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet,

[13] [1902] 1 K. B. 482; [1901] 2 K. B. 867.

[14] 26 N. Y. 309, 311, 315. The rule had already been adopted in the case of failure to deliver goods paid for in advance, without much consideration. Cortelyou *v.* Lansing, 2 Cai. Cas. 200; West *v.* Wentworth, 3 Cow. 82; Wilson *v.* Matthews, 24 Barb. 295.

when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at some period subsequent to the conversion; and the necessary result of all the decisions, in my judgment, is that in such cases the plaintiff is entitled to recover the highest market value of the property at any time intermediate the conversion and the trial." In the case of Brass *v.* Worth,[15] a somewhat different rule was applied. This was also an action for the conversion, by a wrongful sale, of stock which, by special arrangement of the parties, had been purchased, and, as was adjudged, should have been held by the defendant for the plaintiff's account. The measure of damages was held to be, in reference to certain stock, its value on the day when the plaintiff demanded a return of it, and in reference to certain other stock, which had not been demanded, the difference between its market value on a certain day, which was "a reasonable time after the sale, and the cost price of the defendant's purchase thereof, with the interest." But the case of Romaine *v.* Van Allen was adhered to by the court of last resort in Burt *v.* Dutcher,[16] which was an action for the conversion of hops, and was followed by the Supreme Court of the State, in an action for the conversion of grain.[17] The same rule was also applied, by the Superior Court of the city of New York, to the case of a railroad bond lent by the plaintiff to the defendant, by whom it was converted to his own use.[18] The main question now before us was again very fully considered by the New York Court of Appeals, in an action by a principal against his factor, for the conversion of wheat by a sale, in violation of instructions.[19] In this case the plaintiff, who resided in Cleveland, Ohio, having certain wheat in the defendant's store at Buffalo, on the 12th day of July, 1853, telegraphed to the defendants at that city to sell it the same day at $1.08 a bushel, and if it were not sold on that day, to ship it to New York. The defendants accordingly offered the wheat the same day to a person who desired to be

[15] 40 Barb. 648.

[16] 34 N. Y. 493.

[17] Morgan *v.* Gregg, 46 Barb. 183; *acc.*, Lawrence *v.* Maxwell, 6 Lans. 469.

[18] Nauman *v.* Caldwell, 2 Sweeney, 212.

[19] Scott *v.* Rogers, 31 N. Y. 676, 681, 4 Abb. App. 157.

allowed until the following morning to inspect it and decide on the purchase. To this the defendants assented, provided no news were received in the meantime affecting the value, and at eight o'clock the next morning he took the wheat at the price named. The case having been tried by the court without a jury, the sale was found to have been in good faith, but not having been made on the day to which the defendants were limited by their instructions, was adjudged a conversion of the wheat by them. The court fixed the 29th of November, in the same year, as the time within which the plaintiff might reasonably have brought the action. In the Court of Appeals the case was twice argued. On the first argument the court was equally divided. On a reargument before a court differently constituted, the four judges who opposed the severer rule being no longer on the bench, the following conclusions were adopted in an opinion delivered in September, 1864. Hogeboom, J., said:

"In the absence of any definite means for ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach, for the commencement of this action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be, to allow to the plaintiff some reasonable period, within the statute of limitations, for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. . . . This

seems to me the just and equitable rule. It is not, however, perhaps quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. . . . I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit: to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and as between these two periods, the time of commencing the suit and the time of trial, the rule is somewhat fluctuating. What this reasonable time shall be has never been definitely settled, and may, perhaps, fluctuate to some extent, according to the circumstances of the particular case. In the case at bar, it was held to be four months after the conversion, which terminated before the close of navigation in that year; which latter circumstance might perhaps be supposed to have some probable influence in raising the market price of the property in New York, and therefore as not unlikely to induce the plaintiff to retain the property until that time. I think the adjudications allow at least so much latitude in cases similarly circumstanced. For reasons before stated, the limit of time is necessarily, to some extent, arbitrary, for the want of available means to determine when the plaintiff would have sold his property, and, by consequence, the damages he has sustained. But it has been supposed, and I think reasonably, that a liberal allowance of time should be made in favor of the plaintiff, and against the defendant, inasmuch as the latter is the defaulting party."

The judge then compared the rule in trover to that in the case of an executory sale, where the plaintiff had paid the price in advance, and held the two cases to be analogous. He said that in the case of a sale, the highest value between the breach of contract and the commencement of an action, or of the trial of one brought within a reasonable time thereafter, was allowed on the ground that it might be impossible, and was certainly unjust, for the plaintiff to pay the price a second time, in order to procure a similar article to that of which he has been de-

prived; he held that the same reasoning applied to the action of trover, and that the only difficulty lay in fixing the period when the value of the property should be estimated. He added:

"Even if the evidence is satisfactory that the plaintiff intended to retain the property, I do not think that he should be permitted to roam through the entire period between the conversion and the time when the statute of limitations would attach, for the purpose of discovering the highest price at which the property sold in market. This gives to the transaction the color of a mere speculation, and not of a just ascertainment of damages actually sustained."

The rule in this case allows the plaintiff to fix his own damages after a retrospect of the market since the conversion, by selecting the highest market rate of the property during that time, provided within a reasonable time after the conversion he, by bringing the action or otherwise, gives the defendant notice of the day thus selected. But the court simply approved the measure adopted in that case by the judge before whom it was tried, as not unreasonable in itself and not unjust to the defendant. They considered that they could not say that four months after the time when the wheat, if duly forwarded, would have reached its destination, was, as matter of law, an unreasonable time for bringing the suit, and that, on questions of fact, they had no power to review the finding of the judge. But the decision did not reverse the still wider rule previously adopted in the case of Romaine *v.* Van Allen. That rule, in the later case of Burt *v.* Dutcher, was, as has been seen, reaffirmed by the same court. The latter case, as we have observed, was an action for the conversion of merchandise; and in the former, as we have also noticed, the court does not proceed upon the ground of any distinction between stocks and other personal property, in the application of the rule.

In the case of Suydam *v.* Jenkins [20] the English cases giving the value of stock at the time of trial were justified on the ground, "first, that as chancery may decree a specific execution of a contract for replacing stock, and the defendant, when such a decree is made, to enable himself to perform it, must, of ne-

[20] 3 Sandf. 614, 633, an action of replevin.

cessity, purchase the stock at its then market price, he can have no right to complain when he is compelled to pay the same sum as damages, by the judgment of a court of law; and, second, that as stock is usually held not for sale, but as a permanent investment, it is a reasonable presumption that had it not been replaced at the stipulated time, the plaintiff would have retained its possession until the day of trial, and hence its price at that time, whatever it might be, is no more than an indemnity." [21] The objections to the general application of the rule

[21] These are, doubtless, the reasons commonly assigned for the distinction. But it may be observed that it is more than questionable whether a decree can be had for the specific performance of an agreement for the delivery of shares in the public funds, or such other stocks as, from their well-known and permanent character, are usually sought for investment. Breaches of such contracts are readily compensated in damages, and are not, therefore, the subject of equitable relief. Story, Eq. Jur. §§ 717, 717*a;* Buxton *v.* Lister, 3 Atk. 383; Sullivan *v.* Tuck, 1 Md. Ch. Decisions, 59. And in regard to such stocks as are of fluctuating value, the presumption may be at least quite as applicable to them as to any other property, that they were bought for speculative purposes rather than to hold for investment and it must be added that there seems no justification for any *presumption* on the subject. To enable the plaintiff to recover damages on account of the *object* of his purchase, there must be *proof*, and *notice*, not presumption. In Romaine *v.* Van Allen the stock between the time of the conversion and the beginning of the trial rose from $3,937.50, which was its full market price on the day of the conversion, to $5,962.50 before trial began. The trial, which was before a referee, was a protracted one, and during its progress the stock happened to rise in the market to the price of $8,175, which was the highest reached before the trial ended, and was the amount allowed. Here we have this remarkable result of the application of the rule adopted, that from the circumstance that the trial was had before a referee, instead of the court, or a court and jury, the plaintiff gained upwards of $2,000 in the amount of the judgment. It is difficult to see how the principle of compensation could justify this windfall. Again, if the action were brought in the city of New York, where the courts are often oppressed with business, it might be that the suit, although prosecuted with proper diligence, could not be tried within a much longer time than if it were in a contiguous county. On the principle of this case, the verdict for the same conversion, although obtained with proper diligence, might be double if the suit were brought in one county what it would be in another, where the same obstacles to an immediate or speedy trial did not exist. Another serious objection to the rule is, that the reason of it does not apply where the goods were purchased for use, or for some other purpose than for sale, nor even when they were bought for sale, unless the advance occurred within the period during which they would have been sold in the ordinary course of business. In the case in which the rule is least objectionable, that of goods intended for sale, indemnity would require that it be confined to such as were or may be presumed

were, however, stated in a masterly manner by Duer, J., in his celebrated opinion in this case: [22]

"Our objections to considering an intermediate higher value as an invariable rule of damages, have already been stated, and need not be repeated. It is perfectly just, when the enhanced price has been realized by the wrongdoer, or it is reasonable to believe would have been realized by the owner, had he retained the possession; but, in all other cases, damages founded upon such an estimate, are either purely speculative, or plainly vindictive. They are conjectural and speculative, when it is barely possible that the owner, had he retained the possession, would have derived a benefit from the higher value. They are vindictive, when it is certain that no such benefit could have resulted to him."

In Markham *v.* Jaudon,[23] an action for the conversion of stock, it was held by the Court of Appeals that the plaintiff could recover the highest value between the time of the conversion and the time of the trial; that is, the "fluctuating rule" laid down in Romaine *v.* Van Allen was adopted, Grover and Woodruff, JJ., however, dissenting. The same rule was adopted by the Commission of Appeals of New York, in Lobdell *v.*

to have been meant for sale indefinitely in point of time. Where goods were to have been sold either immediately or within a certain fixed period, the range of the plaintiff's right of selection should, on the same principle, be narrowed to the time of the intended sale. So in the case of property which from its nature would have perished, or in the case of articles intended for consumption which would have been consumed within a limited period, the time of the fluctuation of the market, within which the price is to be determined, ought not on any principle of compensation to go beyond such period. In each case, the facts and circumstances showing what would have been the probable disposition of the property by the owner, would seem material in showing his actual loss, and, therefore, in ascertaining the proper indemnity. It is grossly inequitable that the owner should have the advantage of a chance rise in value, which it is certain he had never contemplated, and would not have taken advantage of had the property remained in his possession. The want of uniformity in the rule, and the numerous exceptions which must be engrafted on it, seem grave objections. Whenever the plain and definite rule of the value at the time of conversion or non-delivery is to be enlarged, that modification of it laid down in the case of Suydam *v.* Jenkins, 3 Sandf. 614, *supra*, by which damages beyond the value of the property and interest are allowed only where they are proved, and not merely presumed, to have been sustained, is the most satisfactory which has been suggested. See Meshke *v.* Van Doren, 16 Wis. 319.

[22] P. 629.

[23] 41 N. Y. 235.

Stowell.[24] The Court of Appeals later, however, took a different view, and both these decisions were overruled. In Matthews *v.* Coe,[25] which was an action to recover for an alleged conversion of warehouse receipts of corn, pledged by the plaintiff's assignor as security for advances made by the defendant, decided by that court in March, 1872, it appeared that the defendant had acted in good faith, and moreover that the plaintiff had intended to sell the corn at a dollar a bushel. The price, however, allowed by the referee before whom the action was tried, was fixed by him at the market rate prevailing a year and a half after the action was brought, which was a dollar and forty-five cents a bushel. Church, C. J., delivering the opinion of the court, observed that whatever might be the propriety of a rule giving the plaintiff the benefit of the highest market price between the conversion and the trial, in a case not exceptional in its circumstances, such a rule could have no application to one like that before the court. The learned chief judge closed with the significant intimation that the rule referred to was not so firmly settled as to be beyond the reach of review whenever necessary.

§ 510. Baker v. Drake.

Such a necessity arose in an action decided by the same court in September, 1873, concerning a speculation in stocks like that in Markham *v.* Jaudon, and in which the precise questions there presented were again raised.[26] In this case the plaintiff had advanced but $4,240 on account of the purchase of various railway shares, which, in November, 1868, had cost the defendants upwards of $66,300 beyond the plaintiff's advances. In that month the shares, at a sale of them made by the defendants in good faith, but without authority, at the market rates, to pay their advances, produced less than $67,000. Between this time and that of the trial the stock fluctuated heavily, and in August, 1870, rose in the market to 170, which was its culminating point, and from which it declined. The jury, instructed in accordance with the rule in Markham *v.* Jaudon, found a verdict for the plaintiff of $18,000, which was the dif-

[24] 51 N. Y. 70.
[25] 49 N. Y. 57.
[26] Baker *v.* Drake, 53 N. Y. 211, 217, 13 Am. Rep. 507.

ference between the average price, at which the defendant sold, and 170. This was held error on appeal to the Court of Appeals, where it was said that the proper rule in such a case, was the market price of the stock within a reasonable time after the plaintiff received notice of the conversion. Rapallo, J., in a very learned opinion, said that the supposition that a plaintiff who had failed to keep his margin good up to the sale, would have continued to supply it during the time necessary to carry the stock to its highest point, and then have been fortunate enough to sell it at that precise point, was an unreasonable one, and that the award of a measure of damages based on such a conjecture was a wide departure from that rule of simple indemnity which should control the damages, except in cases where punitive damages are allowable. The learned judge then pointed out, that as he had not paid for his stocks, and did not hold them as an investment, the loss, if any, which he sustained was simply that of the chance of their subsequent rise in the market, and this chance was accompanied by the corresponding one of their decline, and, also, by the further contingency in case of a rise of his not availing himself of it. He added:

"A continuation of the speculation also required him to supply further margin, and involved a risk of ultimate loss. If, upon becoming informed of the sale, he desired further to prosecute the adventure, and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed, or refused to do this, his remedy was to do it himself, and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock, from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale? Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period?"

Under the rule in Markham *v.* Jaudon, as he proceeded to show, the plaintiff is "in a position incomparably superior to

that of which he has been deprived." It leaves him relieved both from risk and from the necessity of supplying "margin," "with his venture out for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end." Meanwhile, obstacles and delays in the progress of the suit are for the interest of the suitor, since they extend the period for his retrospective selection of the rate of his own damages. He pointed out that the reasoning of those decisions which sanction the rule of a higher intermediate value, being founded on the idea that the plaintiff, having been wrongfully deprived of his property or the price agreed to be paid for it, cannot be justly expected to procure it a second time, is necessarily inapplicable to the case of property purchased for speculation, not with his funds, but the defendant's. It is to be noticed that, in this decision, the usual rule in trover, viz., the value of the goods at the time of the conversion, was not adopted, the court proceeding on the theory that the plaintiff should have a reasonable time to replace himself in the market, after notice of the wrong. The rule laid down as the proper one by Rapallo, J., in this case, was distinctly affirmed in a second appeal taken in the above case.[27] It appeared that, at the second trial, the judge charged the jury that the plaintiffs were entitled to recover as damages what it would have cost them to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants, and the recovery was based upon the market value of the stock on a day between the sale and the commencement of the action. This was held to be correct.

§ 511. Wright v. Bank of the Metropolis.

The case of Baker *v.* Drake was approved, and the rule laid down by Rapallo, J., extended, in the later case of Wright *v.* Bank of the Metropolis,[28] an action for the wrongful sale of pledged stock. In that case Peckham, J., said:

"In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same. . . . There is no material distinction in the fact of

[27] Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80.

[28] 110 N. Y. 237, 246, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289. The rule was again sustained in Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692.

ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrongdoer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial, would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation, for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall be only such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

"It is said that, as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the

value. But the duty of the plaintiff to make the damages as light as he reasonably may, rests upon him in both cases, for there is no more legal wrong done by the defendant in selling the stock, which the plaintiff has fully paid for, than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time, does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial, and the price at that time there might be some degree of propriety in awarding under certain circumstances, if it were higher than when it was converted. But to presume, in favor of an investor, that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming of course, in all cases, that there was good faith on the part of the defendant.

"It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law." [29]

§ 512. Result of the New York cases.

The result of the New York cases is that the rule of the higher intermediate value is applied in stock transactions, but in a very limited form; the highest value being allowed only between the time of injury and the time when the plaintiff by due diligence might have replaced himself in the market. The rule is applicable to all cases of conversion or breach of contract to deliver stocks. Subsequent decisions have only strengthened and extended it.[30] So, where a broker improperly closed out a speculation whereby he had sold stock short for a customer, the measure of damages is the difference between the price at which the short stock was bought in and the lowest market price of the stock within a reasonable time after the sale, less broker's commission.[31] The rule also applies to dealings in contracts for the future delivery of tangible chattels of a fluctuating value, *i. e., cotton futures.*[32] If no evidence is given by which the value of the article within a reasonable time after notice can be determined, only nominal damages can be recovered.[33]

Gruman *v.* Smith [34] was a stockbroker's action for balance of account on stock carried. A stockbroker sells, without due notice, stock bought and carried for a customer, on margin.

[29] As already explained (see chap. XI) the editors of the present edition are not of opinion that the measure of *cost of replacement* rests on a *duty* to replace, but on its being the natural and normal measure, in accordance with the custom of the market, under the rule of avoidable consequences.

[30] Minor *v.* Beveridge, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804 (conversion by broker); Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692 (conversion by pledgee). See also Flagler *v.* Hearst, 91 App. Div. 12, 86 N. Y. Supp. 308; Corn Exchange Bank *v.* Peabody, 111 App. Div. 553, 98 N. Y. Supp. 78.

[31] Barber *v.* Ellingwood, 137 App. Div. 704, 129 N. Y. Supp. 414.

[32] Hurt *v.* Miller, 120 App. Div. 833, 105 N. Y. Supp. 775.

[33] Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692.

[34] 81 N. Y. 25.

This is a conversion, although the sale is on account of the failure of the customer to put up additional margin called for. It was held that this does not extinguish the entire claim of the broker, and hence his complaint cannot be dismissed. He is liable in damages, but whether they would equal the amount of the claim depends on the facts developed. The title of the stock purchased was in the customer, and the stock carried and margins put up constituted a pledge to secure the debt. The stock sold at 90. If it went down to 50 and remained there, the defendant would be benefited by the sale. The defendant might be able to show that the market value of the stock at the time of sale exceeded the price for which it was sold; and he was entitled to a reasonable time *after notice*, to replace himself; and if meantime it had advanced in price, the defendant would be entitled to the difference; beyond that he is not injured. In other words, he has a right to notice for the purpose of replacing himself, and the value of that right is the actual measuring of the injury.

In Colt *v.* Owens [35] defendants purchased and agreed to carry stock for plaintiff, until instructed to sell, for a period of six months. No money was paid by plaintiff, but he furnished the defendants the guaranty of a third person against loss. The defendants sold the stock without authority, and gave the plaintiff notice. In an action to recover damages, it appeared that for thirty days after the sale, the stock could have been bought in the market for the price of which it was sold, or less. It was held that the plaintiff, having had a reasonable time to replace the stock, could only recover nominal damages.

§ 512a. Notice and reasonable time under the New York rule.

The limit of reasonable time, and the point of time from which it begins to run, must depend upon circumstances. There must be either actual or constructive notice.[36] The plaintiff is entitled only to the highest price within a reasonable time after "he has learned of the conversion." When the facts are undisputed, the question is one of law,[37] but prece-

[35] 90 N. Y. 368.

[36] Smith *v.* Savin, 141 N. Y. 315, 329, 36 N. E. 368.

[37] Wright *v.* Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Burnham *v.* Law-

dents are of little value.[38] For a person living near the stock market, it has been intimated that forty days after notice is too long a period [39] and that thirty days is the limit.[40] In Rosenbaum *v.* Stiebel [41] the referee on whose opinion judgment was affirmed said:

"In the absence of evidence of special circumstances showing other elements of necessity for further time, we think it may be stated as a general rule that the customer is entitled to a reasonable opportunity to consult counsel, to employ other brokers, and to watch the market for the purpose of determining whether it is advisable to purchase on a particular day, or when the stock reaches a particular quotation, and to raise funds if he decides to repurchase. Doubtless the customer's financial ability would not enter into a determination of the question; but, assuming that he had property or securities, he should be given a reasonable time to convert them into money or to raise money on their security. Perhaps the most important of these elements is time to reflect and consider what is the tendency of the market and at what price it is advisable to purchase, in view of all the facts and circumstances." [42]

§ 513. Cases in the Supreme Court of the United States.

The question has been considered by the Supreme Court of the United States. Where a contract was made [43] to redeliver to the plaintiffs flour left with the defendants and not paid for, the plaintiff claimed damages only at the rate of the price of flour on the day fixed for delivery; and though the case went up to Washington, nothing was decided.

In an action brought in Louisiana,[44] by petition or libel, the forms of action of the English law being there unknown, on a contract for the delivery of cotton at 10 cents per pound, on or before the 15th day of February, when the article was 12 cents per pound, it appeared that it had risen to 30 cents before the

son, 103 N. Y. Supp. 482, 118 App. Div. 389.

[38] Burham *v.* Lockwood, 71 App. Div. 301, 75 N. Y. Supp. 828.

[39] Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338.

[40] Burham *v.* Lockwood, 71 App. Div. 301, 75 N. Y. Supp. 828.

[41] 137 App. Div. 912, 122 N. Y. Supp. 131.

[42] 122 N. Y. Supp. 135.

[43] Douglass *v.* McAllister, 3 Cranch, 298, 2 L. ed. 446.

[44] Shepherd *v.* Hampton, 3 Wheat. 200, 204, 4 L. ed. 369.

suit was brought; the plaintiffs insisted that they were entitled to the highest market price up to the rendition of the judgment. But the unanimous opinion of the court was, "that the price of the article at the time it was to be delivered was the measure of damages." Marshall, C. J., said: "For myself only, I can say that I should not think the rule would apply *to a case where advances of money* had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case."

The New York rule, so far at least as stock transactions are concerned, has been adopted by the Supreme Court of the United States. In Galigher *v.* Jones,[45] Bradley, J., said:

"It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value as applied

[45] 129 U. S. 193, 200, 9 Sup. Ct. 335, 32 L. ed. 658; *acc., In re* Swift, 114 Fed. 947. Where there is no proof of difference in value at the respective dates the question cannot arise. Logan Co. Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. 496.

to stock transactions has been adopted in England and in several of the States in this country, whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. . . . It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law."

§ 514. Pennsylvania.

In Pennsylvania the rule of the highest intermediate value is not applied in actions for the non-delivery of chattels generally, though the price has been paid in advance,[46] nor in actions for the conversion of personal property.[47] In the case of the conversion of stock, the general rule is to some extent modified. Where the consideration for the stock has been paid, its highest market value between the breach and the trial, together with the bonus and dividends received in the meantime, is the rule; where the consideration has not been paid, the plaintiff is allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock.[48] The general rule in trover is said not to apply "where the article could not be obtained elsewhere, or where from restrictions on its production or other causes its price is necessarily subject to very considerable fluctuations." In the case of bank stock which is within this exception, the ordinary rule would hold out temptations to acts of wrongful conversion, by making them profitable to the wrongdoer, since the bank or any other trustee might deprive the owner of the very advantage he had in view when he made the investment. So, in an action to replace borrowed stock, where the value of the stock was highest at the time of the trial, that value was held in an early case to be the proper measure of damages.[49] But the principle of these decisions applies only to the case of a refusal to perform the contract,

[46] Smethurst *v.* Woolston, 5 W. & S. 106.

[47] Neiler *v.* Kelley, 69 Pa. 403.

[48] Bank of Montgomery *v.* Reese, 26 Pa. 143.

[49] Musgrave *v.* Beckendorff, 53 Pa. 310.

whereby the plaintiff suffers the loss in the advance of the price of the stock.[50] In Neiler *v.* Kelley [51] Sharswood, J., said that in cases of trover for stock the ordinary rule, "is not changed, but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity—are not always to be obtained at any price, and are of very fluctuating value. These are supposed to constitute sufficient reasons for the distinction." But it has finally been held that the rule in Pennsylvania does not apply to ordinary stock contracts, but only to trusts, and cases where justice could not be reached by the ordinary measure of damages.[52] In a case where a plaintiff, who had paid for stock, formally tendered it back to the defendant, and demanded the return of the money, or the defendant's note for the amount, pursuant to one of the terms of sale, the measure of damages was held to be the amount paid, and not the market price at the time of the refusal.[53]

The Pennsylvania courts make a broad distinction between cases involving conscious wrong and all others. "In all cases not involving an actually wrongful conversion or breach of trust, the old and well-established rule still prevails that the value of the stock at the time of the technical conversion, with interest thereon, is the true measure of damages." Hence when stock is wrongfully transferred under a forged power, the measure of damages in an action against the company is the market price of the stock at the time of the transfer; [54]

[50] Phillips' Appeal, 68 Pa. 130. See also Reitenbaugh *v.* Ludwick, 31 Pa. 131.

[51] 69 Pa. 403, 408.

[52] Bank of Montgomery *v.* Reese, 26 Pa. 143; Work *v.* Bennett, 70 Pa. 484; Huntingdon & B. T. R. R. & C. Co. *v.* English, 86 Pa. 247; North *v.* Phillips, 89 Pa. 250; Pennsylvania Co. for Insurance *v.* Philadelphia, G. & N. R. R., 153 Pa. 160, 25 Atl. 1043.

And so it is held to-day that the measure of damages for breach of contract to return borrowed stock is the value of the stock at the time of demand for return. Jennings *v.* Loeffler, 184 Pa. 318, 39 Atl. 214.

[53] Laubach *v.* Laubach, 73 Pa. 387.

[54] Penna. Co. for Insurance *v.* Phila., G. & R. R. R., 153 Pa. 160, 25 Atl. 1043.

while on the other hand in an action against a broker for conversion by a premature sale of the stock he was carrying the highest price between the conversion and the trial was allowed.[55]

§ 515. Alabama, South Carolina, Wyoming.

In Alabama the latest cases hold it proper to give evidence of the highest value between the time of the conversion and that of the trial, and it is in the discretion of the jury to give the value they judge proper between this highest value and the value at the time of conversion, with lawful interest from that time;[56] but the jury has no discretion to give a lower value than that at the moment of conversion, so that the defendant cannot show that the value has diminished after the date of conversion.[57] The rule is not confined to commercial securities of fluctuating value, but extends to other personal property as well; *e. g.*, a mare.[58] In Burks *v.* Hubbard [59] the court said: "This discretion of the jury in selecting the exact period of valuation should be exercised in such a manner as to prevent the defendant from reaping pecuniary profit through his wrongful act, and at the same time, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages as exact justice may require." [60]

The rule in South Carolina [61] and in Wyoming [62] seems to be the same as in Alabama. If the tort is committed under a

[55] Learock *v.* Paxson, 208 Pa. 602, 57 Atl. 1097.

[56] Loeb *v.* Flash, 65 Ala. 526; Street *v.* Nelson, 67 Ala. 504; Renfro *v.* Hughes, 69 Ala. 581; Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Henderson *v.* Hollind (Ala. App.), 55 So. 323. See Calhoun *v.* Art Metal Constr. Co., 152 Ala. 607, 44 So. 877.

In the earlier cases the court appears to have laid down the rule in the more common form, without leaving it to the discretion of the jury.

Conversion: Tatum *v.* Manning, 9 Ala. 144; Ewing *v.* Blount, 20 Ala. 694; Jenkins *v.* McConico, 26 Ala. 213. *Detinue:* Johnson *v.* Marshall, 34 Ala. 522. But in case of non-delivery of goods sold, higher intermediate value was disallowed. Rose *v.* Bozeman, 41 Ala. 678.

[57] Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309.

[58] McGowan *v.* Lynch, 151 Ala. 458, 44 So. 573.

[59] 69 Ala. 379, 384.

[60] But see § 517.

[61] Gregg *v.* Bank, 72 S. C. 458, 52 S. E. 195. See an earlier case, Kidd *v.* Mitchell, 1 N. & McC. 334.

[62] Hilliard Flume Co. *v.* Woods, 1 Wyo. 396.

bona fide claim of right, the jury, it is said, ought not to give a very high verdict based on subsequent rise in value; but the remedy for a capricious exercise by the jury of its discretion is a new trial.[63]

§ 516. Florida, Arkansas, Mississippi.

In Florida the rule of the highest market value was approved by the court, in Moody *v.* Caulk,[64] as the proper one in the case of stock held for investment, of rare pictures, jewels, and like articles, provided the jury be satisfied that the plaintiff would have held the property up to the time of the advance. In Peterson *v.* Gresham,[65] the rule in Arkansas was said to be "in cases where there is an increase in value after the taking and before the demand, suit, or actual conversion," the highest market value during this time; but it was said, when the property was actually converted and passed beyond the possible reach of the plaintiff, then, in trover, its value and the interest is the fixed measure of damages.

In Mississippi,[66] the Court of Errors and Appeals, while rejecting the fluctuating rule, maintained the following exceptions to the fixed rule of the value and interest: First, where the original act was wrongful; second, where it was *bona fide*, but the defendants subsequently disposed of the property wrongfully, and with knowledge of the plaintiff's claim; third, where the taking and disposition of the property were both in good faith, but the defendant seeks to retain the excess of the proceeds of the sale over the market value at the time of the conversion "as a speculation"; and fourth, where the property has some peculiar value to the plaintiff, and is wilfully taken or withheld by the defendant. In the several classes of cases thus excepted by the learned court, the rule of compensation, in its opinion, is abandoned, and the damages are left at large to the jury. The last exception, however, as we think, with deference, might be properly included in the preceding ones.[67]

[63] Carter *v.* Du Pre, 18 S. C. 179, 44 Am. Rep. 569.

[64] 14 Fla. 50.

[65] 25 Ark. 380, 388, per Gregg, J. In an action for the conversion of scrip, the measure of damages is obviously not "the highest price" at which it would have been sold "at the time of conversion." Hamburg Bank *v.* George, 92 Ark. 472, 123 S. W. 654.

[66] Whitfield *v.* Whitfield, 40 Miss. 352.

[67] *Acc.*, Bickell *v.* Colton, 41 Miss. 368.

§ 516a. Indiana.

In Indiana the rule laid down in New York and in the Supreme Court of the United States is followed, and the measure of damages allowed is the highest intermediate value between the injury and a reasonable time after notice for replacement in the market.[68]

§ 516b. Iowa.

In Iowa, in case of the conversion of goods in general, the plaintiff is restricted to the value of the property at the time of conversion, with interest.[69] But in the case of corporate stock the plaintiff may recover the highest value which it attains between the time of conversion and a reasonable time for replacing it, if the purchase price has not been paid; or, if the purchase price has been paid, then the highest value between the conversion and the time of the bringing of the action, providing the bringing of the action is not unreasonably delayed; and in addition to this, there may also be recovery of interest and dividends.[70]

§ 516c. Texas, Australia.

In Texas and in Australia the rule of highest intermediate value between the injury and the time of trial is adhered to;[71] subject, however, to the limitation that the action must be brought seasonably, otherwise the plaintiff is restricted to the value at the time of the injury.[72]

[68] Citizens' Street R. R. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649, 25 Am. St. Rep. 445.

See the earlier cases: Kent *v.* Ginter, 23 Ind. 1; Ellis *v.* Wire, 33 Ind. 127.

[69] Gensburg *v.* Marshall Field & Co., 104 Iowa, 599, 74 N. W. 3, and cases cited.

[70] Loetscher *v.* Dillon, 119 Ia. 202, 93 N. W. 101; Doyle *v.* Burns, 123 Ia. 488, 99 N. W. 195. See the earlier cases: Cannon *v.* Folsom, 2 Ia. 101; Davenport *v.* Wells, 3 Ia. 242; Harrison *v.* Charlton, 37 Ia. 134; Myer *v.* Wheeler, 65 Ia. 390; Gilman *v.* Andrews, 66 Ia. 116; Gravel *v.* Clough, 81 Ia. 272, 46 N. W. 1092.

[71] *Texas:* Stephenson *v.* Price, 30 Tex. 715; Witliff *v.* Spreen, 51 Tex. Civ. App. 544, 112 S. W. 98; Randon *v.* Barton, 4 Tex. 289; Calvit *v.* McFadden, 13 Tex. 324; Brasher *v.* Davidson, 31 Tex. 190; Gregg *v.* Fitzhugh, 36 Tex. 127.

Australia: Amoretty *v.* City of Melbourne Bank, 13 Vict. L. R. 431; Vicary *v.* Foley, 17 Vict. L. R. 407.

[72] *Texas:* Heilbroner *v.* Douglass, 45 Tex. 402.

Australia: Amoretty *v.* City of Melbourne Bank, 13 Vict. L. R. 431 (*semble*).

§ 517. California.

In California, although the "highest value" rule was for a time adopted,[73] it was soon said that "some qualification of the rule may be found necessary where there has been an unreasonable delay in bringing suit, or under certain special circumstances." [74] And in a later case the rule was accordingly seriously modified. In May, 1863, the defendant had wrongfully replevied hay crops, then not worth over $2,500. The following year, in consequence of a drought, the price of hay rose enormously, and the jury, having been allowed to assess the plaintiff's damages at any market rate prevailing after the conversion, with interest, found a verdict for $25,763.37. The court, after reviewing the history of the fluctuating rule, say that it is an exceptional one of American origin, and that, if unqualified, it is unjust. Rejecting, however, as illogical and unreasonable the particular qualification of it sometimes adopted as to diligence in bringing and prosecuting the suit, they conclude that, in the class of cases in which it has been applied, the correct measure is the highest market value within what, under the circumstances of each case, is a reasonable time after the property was taken, with interest "from the time when the value was estimated." As the action had not been brought till 1869, they thought that too wide a range had been allowed the jury, and therefore set aside the verdict.[75] But soon after this decision a statute was passed,[76] to the effect that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest, or, where action has been prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest at the option of the injured party, and a fair compensation for time and money properly expended in pursuit of the property.[77]

[73] Douglass *v.* Kraft, 9 Cal. 562; *acc.*, Dabovich *v.* Emeric, 12 Cal. 171.

[74] Hamer *v.* Hatheway, 33 Cal. 117.

[75] Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462.

[76] Cal. Civ. Code, § 3336.

[77] Fromm *v.* Sierra Nevada S. M. Co., 61 Cal. 629; Niles *v.* Edwards, 90 Cal. 10, 27 Pac. 296; Ralston *v.* Bank of California, 112 Cal. 208, 44 Pac. 476; Lynch *v.* McGhan, 7 Cal. App. 132, 93 Pac. 1044.

§ 517a. Other jurisdictions having a statutory rule.

The California statute has been adopted in several of the western States. It was early adopted in Dakota [78] and reaffirmed in North Dakota.[79] It has also been adopted in Oklahoma.[80] A similar statute was passed independently in Georgia.[81]

§ 518. New Hampshire.

The rule of highest intermediate value was disapproved in New Hampshire in the important case of Pinkerton *v.* Manchester and Lawrence Railroad,[82] after a review of the cases, and the value of the articles which should have been delivered at the time of the failure to deliver them, is held to be the just and convenient measure of damages. Bellows, J., said:

"The general rule here and elsewhere is, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery. But a distinction has been made in some jurisdictions, by which, where the price has been paid in advance, the plaintiff has been allowed to elect the value at the time when the property ought to have been delivered, or at the time of trial, or, as some cases hold, the value at any intermediate period. Such a distinction has been recognized in England, in New York, and in the courts of some other States in the Union, upon the ground that the seller, having got the money of the plaintiff, the latter may be deprived of the means, by the seller's act, of going into the market and purchasing the same property at the then market prices.

"There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the value of the property at the

[78] Dak. Comp. L., § 4603.

[79] Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446 (in this case Corliss, C. J., said that it would "work out absurd results"); First Nat. Bank *v.* Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 221.

The statute is to be strictly construed. First Nat. Bank *v.* Minneapolis & N. E. Co., 8 N. D. 430, 79 N. W. 874.

[80] Funk *v.* Hendricks, 24 Okla. 837, 105 Pac. 352.

[81] Barnett *v.* Thompson, 37 Ga. 335.

[82] 42 N. H. 424, 457, 461.

time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dyestuffs, etc., to hold that the plaintiff might elect, as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For, in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial, or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and the trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances of unjust extortion, which no court could contemplate without pain."

This case was followed later in Frothingham *v.* Morse.[83]

[83] 45 N. H. 545.

§ 519. Other jurisdictions following the general rule.

The rule of highest intermediate value is disapproved and the general rule, giving the value at the time of the loss, or, in case of stock carrying contracts, the New York rule, followed in most jurisdictions.[84] In Georgia this rule was followed where the conversion was not a continuing one, but began and ended in a single act, as a sale.[85]

In a case in Michigan [86] Cooley, J., said:

[84] *Connecticut:* Hurd *v.* Hubbell, 26 Conn. 389. *Contra,* in case of non-delivery when the price was paid in advance: West *v.* Pritchard, 19 Conn. 212.

District of Columbia: Non-delivery of stock: Tayloe *v.* Turner, 2 D. C. (2 Cr. C. C.) 203.

Illinois: Smith *v.* Dunlap, 12 Ill. 184; Otter *v.* Williams, 21 Ill. 118; Sturges *v.* Keith, 57 Ill. 451; Brewster *v.* Van Liew, 119 Ill. 554, 59 Am. Rep. 623; Shaefer *v.* Dickinson, 141 Ill. App. 234. *Non-delivery of goods sold:* Cushman *v.* Hayes, 46 Ill. 145.

Kentucky: Sproule *v.* Ford, 3 Litt. 25; Lillard *v.* Whittaker, 3 Bibb, 92.

Louisiana: Vance *v.* Tourne, 13 La. 225.

Maine: Freeman *v.* Harwood, 49 Me. 195, 77 Am. Dec. 254. *Failure to return borrowed stock:* McKenney *v.* Haines, 63 Me. 74.

Maryland: Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35. *Refusal to transfer stock:* Baltimore Marine Ins. Co. *v.* Dalrymple, 25 Md. 269, 306, 80 Am. Dec. 779, *n.* (*semble*); Baltimore C. P. Ry. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402; Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

Massachusetts: Conversion: Kennedy *v.* Whitwell, 4 Pick. 466; Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Johnson *v.* Sumner, 1 Met. 172. *Refusal to issue or transfer stock:* Gray *v.* Portland Bank, 3 Mass. 364, 390, 3 Am. Dec. 156; Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Hussey *v.* Manufacturers' & M. Bank, 10 Pick. 415; Wyman *v.* American Powder Co., 8 Cush. 168. In Maynard *v.* Pease, 99 Mass. 555, in the case of a sale by a factor below a limit fixed by principal, the rule in Baker *v.* Drake was adopted as at least one of which defendant could not complain.

Michigan: Bates *v.* Stansell, 19 Mich. 91; Chadwick *v.* Butler, 28 Mich. 349, 352, per Cooley, J. (*semble*); Jackson *v.* Evans, 44 Mich. 510.

Missouri: Conversion: Walker *v.* Borland, 21 Mo. 289.

Nevada: Conversion: O'Meara *v.* North American M. Co., 2 Nev. 112, 90 Am. Dec. 306; Boylan *v.* Huguet, 8 Nev. 345.

North Carolina: Conversion: Arrington *v.* Wilmington & W. R. R., 6 Jones L. 68, per Ruffin, J. (*semble*).

Ohio: Failure to return borrowed stock: Fosdick *v.* Greene, 27 Oh. St. 484, 22 Am. Rep. 328.

Tennessee: Non-delivery of goods sold: Coffman *v.* Williams, 4 Heisk. 233, 240.

Vermont: Non-delivery: Hill *v.* Smith, 32 Vt. 433; Copper Co. *v.* Copper Mining Co., 33 Vt. 92; Austin *v.* Langlois, 83 Vt. 104, 74 Atl. 489.

Wisconsin: Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762, explaining Weymouth *v.* Chicago & N. W. Ry., 17 Wis. 550, 84 Am. Dec. 763; Webster *v.* Moe, 35 Wis. 75.

Canada: McMurrich *v.* Bond H. H. Co., 9 Up. Can. Q. B. 333 (*semble*); Glenn *v.* Schaffer, 17 W. L. Rep. 273.

[85] Dorsett *v.* Frith, 25 Ga. 537.

[86] Chadwick *v.* Butler, 28 Mich. 349, 352.

"A party's right of recovery must be deemed fixed at some time, and he cannot wait for an indefinite period and speculate upon the changes in the market while taking upon himself none of the risks of decline. This would put him in a better position than if he had the property in possession; for then, if he would realize upon it, he must select a particular time for making sale, and accept the price at that time; while under the rule relied upon he may have the highest price for a series of years by simply postponing the bringing of suit."

§ 520.[a] Time of breach or tort.

When it is said that the measure of damages is fixed by the time of the conversion, trespass, or breach, or other wrong, it must not be overlooked that this does not necessarily mean the moment at which the act is done which becomes the foundation of the suit. As the plaintiff frequently has a choice of remedies, *e. g.*, to ratify the act done, as in the case of a wrongful sale, or to call upon the wrongdoer to replace him, or to replace himself, the time at which the cause of action becomes complete, by no means necessarily coincides with the initial moment of wrong. In all such cases, the time cannot be fixed until the plaintiff has had notice or acquired knowledge of the wrong. Under the rule of highest intermediate value he may select a date arbitrarily from a period of time; under the rule of Baker *v.* Drake, he has a reasonable period of time to determine his course of action. The question of time may be also complicated by the agreement between the parties. Where negotiable securities are pledged for a time loan, it is the duty of the pledgor to keep the securities on hand at all times ready to be delivered to the pledgee on payment of the debt. An unauthorized sale is a conversion, but the pledgor may elect to treat the sale as a breach of the continuing duty to keep the securities till maturity; and if this is so, he can sue for the market value of the securities *at the time of the maturity of the contract*. He may, in other words, select one of two points of time.[87] And in the simple case of conversion, the election of

[a] For § 520 of the eighth edition, see § 522.

[87] Dimock *v.* U. S. Nat. Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

the plaintiff may be made manifest by a *demand* for the stock pledged, and if this demand comes in the form of an action, the time of conversion coincides with that of the action and the time of its commencement fixes the initial point of liability.[88]

§ 521.[a] Importance and limitations of the New York rule.

The importance of the New York rule comes, as has been noticed by one of the courts which has had the matter under consideration, from the fact that the market for the greater part of all the speculative stock transactions in the country is the New York Stock Exchange. The rule laid down in the leading case of Baker *v.* Drake [89] may be described as the one rule which has survived the struggle for an expression of the principle underlying the allowance of a higher intermediate value.

It must not be forgotten, as is too often the case, that the rule in Baker *v.* Drake was limited by its learned author to the case which he had before him. Judge Rapallo never laid it down as a general measure of damages in all cases of conversion of stock. The case before him was that of a pledge of stock purchased on a margin, and pledged as security for a continuing contract to carry it with a view to profits through a rise in the market. There were two wrongs, one a tort—the conversion of the stock—the other a breach of the contract between pledgee and pledgor *not to sell without notice.* In either case there was room for the recovery of something more than the value of the stock at the time of the conversion: in one case, the "probable profits"; in the other the actual enhancement in the value of the stock down to the end of the reasonable time within which the plaintiff might, had he not been kept in ignorance of the sale, have fixed the amount of the loss by replacement.[90] Thus limited, the rule has stood the test of time. But it must not be mistaken for an universal rule, in all cases of conversion of stock. This fact is illustrated by the most recent cases. In

[a] For § 521 of the eighth edition, see § 523.

[88] Continental Divide M. I. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

[89] 66 N. Y. 518, 23 Am. Rep. 80.

[90] See this case fully explained *ante*, chap. XI.

McIntyre *v.* Whitney [91] brokers converted stock purchased for a customer, on a margin. It was at the time worth $45,125. Without any knowledge of this, the customer deposited with the pledgees additional "margin," amounting to $25,000. Between the time of the discovery by him of the conversion, and a reasonable time to replace, the highest market value was $26,625; he then still owed $15,000, balance unpaid on the loan; this he tendered, and demanded his stock; defendants were unable to deliver it. The referee to whom the case was referred, applied the rule in Baker *v.* Drake and gave the plaintiff the difference between the highest market prices and $15,000. But on appeal the judgment was not allowed to stand; Miller, J., saying that, by that rule, the plaintiff could recover about one-third of what he had paid in cash, while the defendants would pocket as profits the amount of the decline in the market value of the stock, or $18,500. On appeal the judgment was modified so as to give the plaintiff the difference between the actual value of the stock converted, or $45,125, less the unpaid balance of $15,000, or $30,125, with interest on balances.[92]

This case, together with another recent decision in the same court,[93] gives a very complete view of the present state of the law in New York, and probably most other American jurisdictions in which stock-carrying contracts are treated as involving a pledge of stock owned by the customer. The rule may be stated as follows:

1. Whether the action is regarded as sounding in contract or tort, the customer is entitled at least to the benefit of the price actually realized.

2. Owing to the purpose of the contract itself having a reference to the fluctuations of the market, he is entitled in addition to the rise in the market within a reasonable time after he has knowledge of the sale, for replacement, either by the broker, or by himself.

3. All this is based on the assumption that the broker has

[91] 139 App. Div. 557, 124 N. Y. Supp. 234.

[92] The Court of Appeals affirmed the judgment as modified, no opinion being written. McIntyre *v.* Whitney, 201 N. Y. 526, 94 N. E. 1096.

[93] Barber *v.* Ellingwood, No. 2, 137 App. Div. 704, 122 N. Y. Supp. 131.

fully accounted to the customer for the money received by him, and that the customer is suing only for the profits of the venture, or the full damages occasioned by the tort.

4. If the securities have been *paid* for, the customer is entitled to their full value as ascertained by the highest price under the Baker *v.* Drake rule.[94]

5. If the broker was not reimbursed by the unauthorized sale for his advances he will be entitled to interpose a counterclaim for the balance.

6. When the stock has steadily declined in value, the rule in Baker *v.* Drake is necessarily inapplicable, and the plaintiff recovers the price for which the stock was sold less any balance due the broker, with interest.

§ 522. The New York rule and avoidable consequences.

The rule in Baker *v.* Drake, like some other variations from the ordinary rule of the *value* at the time of the act complained of, and which deprives the plaintiff of his property, must be considered with reference to the rule of avoidable consequences. It has been already pointed out [95] that the rule of avoidable consequences is a branch of the rule excluding *remote* damages. What the plaintiff would (acting as prudent men usually act) do, on notice of a breach of contract or tort, in order to reduce the loss, the law expects him to do in the ordinary course of things. If he does not take such steps, and the loss is thereby enhanced, this is the result of his own independent volition or negligence, and is only related to the defendant's act as a consequence of that remote class of which the law cannot take cognizance. For instance, in contracts of personal service, the plaintiff earns his living by the work. Hence, it is reasonable to assume that, if thrown out of work by defendant's act, he will reduce the loss as soon as possible by a new contract of service. If he lies by, his subsequent loss of money is the result of his own choice, not of the defendant's act. So, if a roof leaks, it is reasonable to assume that the person whose health and safety are endangered by the leak will repair. If an owner of a

[94] Wright *v.* Bk. of Metropolis, 110 N. Y. 237, 246, 18 N. E. 79, 6 Am. St. Rep. 356, *n.*, 1 L. R. A. 289.

[95] See chap. X.

boat looking for freight loses it through defendant's act, it is only natural that he should try to get other freight. And so in a multitude of other cases in which the rule has been applied. But it does not follow that because all contracts are founded on the expectation of benefit of some kind, all parties contracting must be expected on a breach to proceed to replace themselves.[96]

§ 523. Nature of the contract to carry stock.

The contract which the New York courts have had principally in view is the agreement by stock brokers *to carry stock for a customer*. The broker buys for the customer a certain number of shares, against which the customer makes a deposit, called a "margin." The intention of the agreement is that if the stock rises the broker shall, on notice, sell the stock for the customer, the latter getting the benefit of the rise. If it falls, the broker is also entitled to demand, by proper notice, additional margin, and on failure to make the margin good he may sell the stock. The broker is said to carry the stock because he advances the whole purchase-money (except the margin), charging the customer with interest and commissions. In New York a transaction of this kind is held to make the relation between the customer and broker that of pledgor and pledgee;[97] and if the broker sells without demand to supply additional margin, or without notice, this amounts to conversion.[98] Whatever the nature of the relation is held to be, it is obvious that the object of the agreement is always to secure a profit from a rise in the market value. It is also, a continuing contract. The broker agrees to carry the stock, not for a definite time, but for an indefinite time, he being not only pledgee, but selling agent as well, and the stock being left in his hands for sale. Both parties contemplate a sale, either at a profit or at a loss. If an unauthorized sale by the broker is regarded as a conversion, according to the ordinary rule the measure of damages would be simply the value of the stock at the time of the sale; if it is looked upon as a breach of a con-

[96] See *ante*, chap. XI.

[97] Gillett *v.* Whiting, 120 N. Y. 402, 24 N. E. 790.

[98] Ib.

tinuing agreement to carry the stock, and have it ready for the plaintiff if he wishes to sell it, there being no fixed time for performance, and the defendant having put performance wholly out of his power, there is no hardship in charging him with all the profits that might with reasonable certainty have been made within the period during which the contract would have continued. But, it has been contended in opposition to the New York rule, there is usually no certainty whatever that any profits would have been made, because the contract might at any moment have been brought to an end by the plaintiff himself. Nor is there in the ordinary case any certainty that he would have directed a sale on a rising market. There is consequently no way of proving with that certainty required by the first principles of the law of damages that he would have had anything but the value of the stock at the time and place of conversion. From this conclusion the New York courts have escaped by a limited application of the rule of avoidable consequences. Discarding from consideration *obiter dicta* in those cases in which a general *duty* of replacement is insisted on,[99] the law in New York, as evolved from Baker *v.* Drake, is quite consistent with itself and with general principles. If the action be regarded as one of contract, the necessary certainty is found in the circumstance that it is a continuing contract to *carry*, and cannot be brought to an end *ipso facto* by a wrongful sale; if as one of tort, the plaintiff has a *right* within a reasonable time after discovery to replacement. What he has been cut off from is the right to be replaced by the broker, or to replace himself, within a reasonable time after he comes to knowledge of the wrongful act, and the value of this right, which on a falling market is worth nothing, on a rising market is worth *something*, and the only way to measure it is that applied in Baker *v.* Drake. Hence it follows that the New York rules as they stand to-day, are not at war with the elementary principles of damages either in contract or tort. The plaintiff is entitled, *at least*, to the value at the time of conversion or failure to deliver. But whenever he has lost with reasonable certainty more than this, he recovers what, in contract, are reasonable

[99] Wright *v.* Bk. of Metropolis, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, *n.*; Weld *v.* Postal T. C. Co., 199 N. Y. 88, 92 N. E. 415.

profits, and in tort are *special* or *consequential damages*. This right again is limited by the rule of avoidable consequences. Whatever, after the expiration of a reasonable time for replacement, he might have made is remote, or uncertain. The reasonable time measures the extent of the right, and its length depends on all the circumstances of the case. The reason why these rules have little or no application in the ordinary case of sales of chattels is not that chattels do not ordinarily fluctuate in price, but because there is not usually any interval between the breach and the time when it comes to the knowledge of the customer. In Illinois, the New York rule is in force [100] as to stock contracts; and contracts to *carry* wheat or corn in that jurisdiction would seem to fall under the same principles.

§ 524. Contract to hold for a rise in the market—Principal and agent.

We have just seen that when a conversion is committed by a broker, selling the plaintiff's stock prematurely, the act may be not only a tort, but also the breach of a continuing contract. Upon principles that will be considered in a later chapter, the measure of damages for breach of such a contract would be regulated by the value of the stock *at the time of performance*.

If, for instance, the broker had directions to sell at a certain price, and that price was reached after the wrongful sale, but before notice to the plaintiff, he should recover damages measured by the value of the stock at that price. If the broker was to hold until ordered to sell, and the plaintiff, after the sale, but before notice of it, gave orders to sell, the value of the stock at the time such orders were given should be taken as the measure of damages. If no orders were given by the plaintiff until after notice of the sale, it is certain that he would have held the stock for a reasonable time after the time at which he had notice of the sale; long enough, at least, for him to send selling orders to the broker and for such orders to be carried out. And though it is impossible to prove that he would have *sold* at that time, it is certain that *he would have had the stock* then; and since, through breach of the broker's

[100] Brewster *v.* Liew, 119 Ill. 555, 59 Am. Rep. 823; Schaeffer *v.* Dickinson, 141 Ill. App. 234.

contract, he did not have it, he would seem entitled to the value of it at that time. This reasoning applies not only to brokers, but to factors, and other agents who hold the property of their principals with power of sale. Accordingly where a factor sells property contrary to his instructions he may, in a proper action, be held liable for the highest market value for a reasonable time after the sale.[101] This principle was approved in a case in North Carolina.[102] In that case a carrier was directed to deliver the plaintiff's goods to a certain factor of his who had instructions as to the sale of the goods. The carrier misdelivered the goods to another factor of the plaintiff, who having no instructions sold the goods. It was held that the same measure of damages should be adopted that would apply in the case of a wrongful sale by the factor to whom the goods were to be delivered; and this was the difference between the price obtained and the highest market price of the goods between the time of the sale and the receipt of notice by the plaintiff.

§ 525.[a] General conclusions.

We have gone into the subject of higher intermediate value in detail, and with liberal extracts from the cases, because otherwise it is involved in great confusion to which there is no apparent key. Arranged historically, however, the cases illustrate curiously the metamorphosis of the law in freeing itself from the old fetters of formal actions. While the forms of action lasted, the effort of the courts was to discover a measure of damages suitable for each form. Now, in trover, this was, owing to a number of causes, peculiarly difficult. It was easy to say that the measure of damages was the value at the time of the conversion, with interest, and that a demand and refusal were evidence of the conversion,[103] but this was no sooner done than it became evident that special circumstances must modify the application of the rule in different cases. The conversion by no means necessarily fixed the actual date

[a] For § 525 of the eighth edition, see § 497*a*.

[101] Loraine *v.* Cartwright, 3 Wash. C. C. 151; Maynard *v.* Pease, 99 Mass. 555; Milbank *v.* Dennistown, 21 N. Y. 386.

[102] Arrington *v.* Wilmington & W. R. R., 6 Jones L. (N. C.) 68.

[103] Gould's Pleading, 4th ed. 52, 53.

of the wrong, for the plaintiff might have had no knowledge of it at the time; the value might have fluctuated greatly before demand and refusal; the property might have had a special value; the plaintiff might be deprived of the opportunity to replace himself; the thing converted might be returned before trial. In the development of the action, it was natural that the courts should at first attempt to establish some more comprehensive rule of damages which should let in all the special circumstances. The rule of highest intermediate value between conversion and verdict was an attempt of this sort. Under it the greatest possible latitude was given the plaintiff, both as to time and value, and many years were wasted before it was settled that such a rule was entirely in conflict with the elementary principles of compensation. Since then, the courts have worked out the theory of a *higher* intermediate value in certain cases, and numerous cases have been found where the plaintiff must be allowed to prove special or consequential damages. At the end we reach what may be called the only general modern rule, the value of the property or property rights lost with interest; increased by special circumstances within the limits fixed by the rules governing consequential damages, and limited by the rule of avoidable consequences. And this, obviously, must have been the modern principle, had the action of trover never been heard of.[104]

[104] See chap. X.

CHAPTER XXIII

ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY

§ 526. Actions for the recovery of personal property.
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§ 526. Actions for the recovery of personal property.

Two forms of action were prescribed by the common law for the recovery of specific personal property—detinue and replevin; the first being generally used where there was a tortious detention only, the latter where there was a tortious taking. The action of detinue has become obsolete except in a few jurisdictions. The action of replevin, on the other hand, or a statutory action of a similar nature, is still in force, and is the action ordinarily resorted to for the purpose of securing the possession of personal property.

The procedure in this form of action is peculiar. Where not modified by local practice, the action is begun by the sheriff taking possession of the property under the writ and delivering it to the plaintiff, who is required to execute a bond conditioned to return the property if he proves not to be entitled to it, and to pay such damages as may be suffered. The question of right to the property is then litigated, and a judgment given for one party or the other; if for the plaintiff, judgment is only for damages in taking and detaining the property; if

for the defendant, it is for a return of the property, and damages for taking and detaining it under the writ. By a modern modification often adopted, judgment in the latter case is, as we shall see, in the alternative, either for a return or for the value of the goods.

If judgment is given for the defendant, two courses are open to him. He may take out a writ of execution on the judgment, as in an ordinary case. But he has also the bond given by the plaintiff upon taking the goods under the replevin writ, and he may bring action upon that. If he choose the latter alternative, his measure of recovery is, first, the amount of the judgment in the replevin suit; second, any further compensation secured to him by the bond. It is therefore clear that in an action on the replevin bond questions involving the measure of damages in actions of replevin may be involved, and some cases of actions upon replevin bonds will necessarily be considered in this chapter. The questions ordinarily involved in actions on such bonds will be considered later. What has been said of replevin bonds applies equally to detinue bonds.

§ 527. Detinue.

* In detinue, as in debt, no damages were generally given for the thing itself, that being recoverable in specie; but merely for its detention. If, however, the property was not finally returned, then damages might be given for its value.[1] "The action of detinue," says the Supreme Court of Tennessee, "is for the thing detained and damages for detention: the value of the property is ascertained by the jury; and the judgment is in the alternative for the sum so found, as the value in case the thing recovered cannot be had." [2] The question on the issue of *non detinet* was whether the chattel were detained, and if so, what was its value and what the damages for its detention; and so the ordinary modern form of verdict in detinue finds the value of the property and damages for its detention.

But, as has been said, if for any reason the property cannot be returned, the plaintiff is entitled to its full value.[3] So, in

[1] Sayer on Damages, 69, 70.

[2] Waite *v.* Dolby, 8 Humph. (Tenn.) 406.

[3] The value is to be taken as of the time of finding the verdict. Penny *v.* Davis, 3 B. Mon. (Ky.) 313. And

the early cases, where we often find detinue brought for charters or title-deeds, if the charters were destroyed or made way with (eloigned), the plaintiff recovered all in damages.[4] ** Damages for the detention may, without proof of a demand, be recovered in this action from the commencement of the defendant's unlawful possession.[5] If the property were destroyed while in the defendant's possession, and without his fault, no part of its value should be included by the jury in their estimate of damages; but if the destruction resulted from the defendant's fault or culpable neglect, the jury may include that value in their estimate of damages.[6] In detinue, deterioration by use is an element of damage [7] in addition to the annual rent or hire of the property.[8] In detinue for slaves, it has been said that emancipation is no defence.[9] In Robinson *v.* Richards,[10] judgment in detinue (for mules) having been entered "that defendant recover of plaintiff (and appellant) the property sued for, or the value as assessed, at his election, and also the damages as assessed," etc., etc., it was held that the words "at his election" should be stricken out, the court further saying that damages in detinue go with the recovery whether of the chattel or of its value. In Holly *v.* Flournoy [11] it was said that the jury might, in their discretion, assess the highest value between the commencement of the suit and the time of trial.

In a case where detinue was brought for stock certificates, which had been returned *pendente lite*, it was held that the jury might confine themselves to an assessment of damages.[12]

where the defendant had an interest in the property (*e. g.*, was a mortgagor), plaintiff recovers the value of his interest only. Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

[4] So held where the property, a slave, died after judgment; but the court intimated that in case of death before judgment only nominal damages could have been given. May *v.* Jameson, 11 Ark. 368.

[5] Gardner *v.* Boothe, 31 Ala. 186; Whitfield *v.* Whitfield, 44 Miss. 254.

[6] Bethea *v.* McLennon, 1 Ired. L. (N. C.) 523.

[7] Freer *v.* Cowles, 44 Ala. 314.

[8] *Alabama:* Carroll *v.* Pathkiller, 3 Port. 279; Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413.

Kentucky: Glascock *v.* Hays, 4 Dana, 58.

[9] Wilkerson *v.* McDougal, 48 Ala. 517.

[10] 45 Ala. 354.

[11] 54 Ala. 99.

[12] Williams *v.* Archer, 5 C. B. 318. See Archer *v.* Williams, 2 Car. & Kir. 26; Crossfield *v.* Such, 8 Ex. 825, 22 L. J. Ex. 325.

Where the plaintiff claims title to the property under a mortgage, evidence of the sale of the property under

In this case the property was demanded; the stock was worth £3 5*s.*; when it was delivered it had fallen to £1, and the plaintiff was held entitled to recover the difference. A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time when his title was divested, and the costs of suit.[13]

§ 528. Replevin.

* The action of detinue has, however, fallen into great disuse, and in some of the States of the Union it is abolished by statute. We proceed, therefore, to the action of replevin. And this action, also, has been so much altered and modified by special statutes, that it will only be proper here to treat of it very succinctly. As to the character of this action, we have already stated that the plaintiff, by his writ, seizes the specific property, and at the same time gives a bond with proper sureties, conditioned to return it, or its value, provided it shall finally appear that he has no right of action. The bond, however, is only a cumulative security to the defendant; and if the plaintiff fails to establish his right, the court may proceed in the action itself to award damages against him, as the result of a claim declared to be unfounded, for the value of the property taken by him.

The nature of the proceeding is well and briefly stated by Parsons, C. J.:

"The plaintiff having by the service of the writ obtained the possession of the goods replevied, prosecutes it to obtain judgment for damages and costs against the defendant for the caption and detention. These are the objects of his suit. The defendant not only resists the plaintiff's claims, but he also complains of an injury arising from the service of the writ. He demands back the chattels, with damages occasioned by the replevin, and his costs in the defense. . . . The distinction between replevin and other actions in which the plaintiff de-

the mortgage by the plaintiff and its purchase by the defendant, after the plaintiff had acquired the possession under the statutory bond given by him in the action, is not competent evidence for the purpose of mitigating the defendant's damages. Foster *v.* Chamberlain, 41 Ala. 158.

[13] Cole *v.* Conolly, 16 Ala. 271.

mands a debt, or damages, or lands, is very clear, because the magnitude of the debt or damages, and the quantity of the land, is involved in the plaintiff's original demand, as well as his title to recover anything. But in replevin, the demand of the defendant is founded on the legal process sued and prosecuted by the plaintiff." [14] **

The essential distinction between trover and replevin as regards the rule of damages, aside from the element of wilfulness in the taking or detention, is briefly this: In trover, the title to the property is regarded as having passed to the defendant, who is therefore liable for its value simply with interest. In replevin, the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself or its value, but also damages for its detention, of which interest may be the measure but is not in all cases the necessary limit.[15]

Either plaintiff or defendant may have a judgment for the value of the property or for damages for detention; but the principles regulating the measure of damages will generally be the same, whether the judgment is in favor of the plaintiff or the defendant. Unless a distinction is expressly made, therefore, the principles stated and the authorities cited will apply equally to judgments for plaintiff or defendant.

Replevin will lie only against one in actual possession of the property at the time suit is instituted.[16]

§ 528a. Separate action by defendant.

It is to be observed that in replevin the plaintiff proceeds on the strength of his own title. The defendant may have (as in New York by statute[17]) the right, in case he prevails, to have his damages assessed in the same action; or he may afterwards bring a separate action for damages.[18] In such a suit the question of title is presumptively *res adjudicata*.[19]

§ 529. Nominal damages.

If the party really entitled to the property fails in the action,

[14] Bruce *v.* Learned, 4 Mass. 614, 617.

[15] McGavock *v.* Chamberlain, 20 Ill. 219.

[16] Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044.

[17] L. 1882, chap. 410, § 1342.

[18] Brady *v.* Beadleton, 17 N. Y. Supp. 42.

[19] Brady *v.* Beadleton, 17 N. Y. Supp. 42, 43.

on account of a technicality, such as failure to prove a formal demand for the property, the prevailing party recovers nominal damages only.[20] So when the detention was momentary only, nominal damages for detention will be recovered.[21] And where a verdict is given for the plaintiff, this entitles him to nominal damages for the detention if no actual damages are proved.[22]

§ 530. Early English statutes.

*In this action the plaintiff had damages at common law; and, by the statute of Gloucester, costs, as a consequence of such damages; but the avowant or defendant in replevin had no costs, although in many cases where an avowry or conusance was made, and a return prayed, the defendant was an actor.[23] In consequence of this hardship two statutes were passed [24] giving such damages and costs to the defendant as the plaintiff would have had at common law.[25] These statutes have been generally re-enacted in this country; and where the statutes, or the decisions founded on them, do not apply, a reasonable rule may generally be deduced from the analogous cases decided upon the actions of trover, trespass *de bonis asportatis*, case for injury to personal property, and on sales of chattels.**

§ 531. Value of the property.

Where the chattel is not returned by the unsuccessful party, the damages must cover its value as well as the injuries done by the detention.[26] If there is no evidence on the record of

[20] *United States:* Treat *v.* Staples, 1 Holmes, 1.

Iowa: Harman *v.* Goodrich, 1 Greene, 13.

Maryland: Belt *v.* Worthington, 3 G. & J. 247.

New York: Pierce *v.* Van Dyke, 6 Hill, 613.

[21] Whitman *v.* Merrill, 125 Mass. 127.

[22] Starkey *v.* Waite, 69 Vt. 193, 37 Atl. 292.

[23] Bacon's Abr. Costs, F. of Costs in Replevin.

[24] 7 Hen. VIII, chap. 4; 21 Hen. VIII, chap. 19.

[25] James *v.* Tutney, Cro. Car. 497; Rowley *v.* Gibbs, 14 Johns. 385; Caldwell *v.* West, 21 N. J. L. 411.

[26] *Indiana:* Peters, B. & L. Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.

Iowa: Neeb *v.* McMillan, 98 Ia. 718, 68 N. W. 438.

Maryland: Benesch *v.* Weil, 69 Md. 276.

Mississippi: Pearce *v.* Twichell, 41 Miss. 344; Woolner *v.* Spalding, 65 Miss. 204, 3 So. 583.

Missouri: Hohenthal *v.* Watson, 28 Mo. 360; Frei *v.* Vogel, 40 Mo. 149; Hinchey *v.* Koch, 42 Mo. App. 230.

Nebraska: Heidiman-Benoist Sad-

the value of the property or of its use, only nominal damages are allowed.[27] In Washington Ice Co. *v.* Webster [28] the property taken was ice. On assessment of damages for the defendant the jury were told that the defendant was entitled to the value of the ice at the time it was taken and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. If it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market he is entitled to whatever value it had at the time and place for any market—its value for any purpose to which it might be put. It was held that this charge was correct, and that if at the place of taking there were no sales, the value should be determined by sales made at the nearest point affording a market. So where the entire machinery of a cloth manufactory, including steam engines and apparatus, had been wrongfully replevied from a manufacturer, it was held in his suit on the replevin bond, the condition of which was, that the plaintiff in replevin should pay all such costs and damages as the defendant in replevin should recover against him, and should also return the goods in like order as when taken, in case such should be the final judgment, that the measure of damages was the same which under ordinary circumstances attending a sale and purchase might reasonably be agreed on as a fair price

dlery Co. *v.* Schott, 59 Neb. 20, 80 N. W. 47.

New Hampshire: Kendall *v.* Fitts, 22 N. H. 1; Messer *v.* Bailey, 31 N. H. 9.

New Jersey: Frazier *v.* Fredericks, 24 N. J. L. 162.

New York: Dows *v.* Rush, 28 Barb. 157; Tracy *v.* New York & Harlem R. R., 9 Bosw. 396.

Oklahoma: Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

Pennsylvania: Swope *v.* Crawford, 16 Pa. Super. Ct. 474.

Tennessee: Sayers *v.* Holmes, 2 Cold. 259.

Canada: Deal *v.* Potter, 26 Up. Can. Q. B. 578; Lewis *v.* Teale, 32 Up. Can. Q. B. 108; Graham *v.* O'Callaghan, 14 Ont. App. 477.

As to the valuation of separate items, see Blakeley *v.* Duncan, 4 Tex. 184.

[27] *Alabama:* Hensley *v.* Orendorff, 152 Ala. 599, 44 So. 869.

Arkansas: Smith *v.* Houston, 25 Ark. 183.

Colorado: Sopris *v.* Webster, 1 Colo. 507.

Illinois: Seabury *v.* Ross, 69 Ill. 533.

Michigan: Phenix *v.* Clark, 2 Mich. 327.

[28] 68 Me. 449. But it is said that in replevin for goods, where there is no claim that they have fluctuated in value or advanced in price, testimony cannot be allowed as to their value *in view of the hazards of the plaintiff's business,* or what they are worth *to him* in the ordinary course of his business. Bonesteel *v.* Orvis, 22 Wis. 522.

for the property between a vendor desirous of selling and a purchaser desirous of purchasing the property as a whole, to be used in the place where it was situated, and for the purpose for which it was intended and arranged.[29] In replevin for a fence, the plaintiff can only recover the value of the materials after removal, not the value of the fence as it stood on the land.[30] In Texas, in an action for the recovery of specific property or its value, a valuation by the jury higher than the evidence warranted, with the view of inducing a surrender of the property, was sustained.[31] Where goods are of special value to the owner, such value may be recovered, though the value to the party in the wrong is much less; so in case of "half-breed scrip" [32] or of vouchers, statement of expenditures upon a building, and an affidavit of their correctness.[33]

§ 531a. Recovery by owner of a special interest.

If the successful party is a special owner, and the other the general owner, recovery can be only for the interest of the special owner.[34] Thus a distraining landlord can recover only the amount of his rent; [35] one holding on a lien can recover no more than the amount of his lien; [36] and a sheriff who has attached or levied upon goods can recover no more than the amount of the debt or execution, with costs and interest.[37] So,

[29] Stevens *v.* Tuite, 104 Mass. 328; *acc.*, Roth *v.* Felt, 111 N. Y. Supp. 649, 60 Misc. 116.

[30] Pennybecker *v.* McDougal, 48 Cal. 160.

[31] Cochrane *v.* Winburn, 13 Tex. 143. We know of no warrant for such a doctrine elsewhere.

[32] Bradley *v.* Gamelle, 7 Minn. 331.

[33] Drake *v.* Auerbach, 37 Minn. 505.

[34] *Kansas:* Wolfley *v.* Rising, 12 Kan. 535; Shahan *v.* Smith, 38 Kan. 474, 16 Pac. 749; Friend *v.* Green, 43 Kan. 167, 23 Pac. 93.

Michigan: Weber *v.* Henry, 16 Mich. 399.

Nebraska: Kersenbrock *v.* Martin, 12 Neb. 374; Cruts *v.* Wray, 19 Neb. 581; Jameson *v.* Kent, 42 Neb. 412, 60 N. W. 879.

[35] Hart *v.* Tobias, 2 Bay (S. C.), 408.

[36] *Indian Territory:* George R. Barse Live Stock Commission Co. *v.* Adams, 2 Ind. Ty. 119, 48 S. W. 1023.

Nebraska: Creighton *v.* Haythorn, 49 Neb. 526, 68 N. W. 934.

So of pledgee: Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251.

[37] *Colorado:* Whitkowski *v.* Hill, 17 Colo. 372, 30 Pac. 55.

Iowa: Hayden *v.* Anderson, 17 Ia. 158.

Minnesota: Dodge *v.* Chandler, 13 Minn. 114.

Missouri: Hall *v.* Bramell, 87 Mo. App. 285.

Nebraska: Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. 149; Gates *v.* Parrott, 31 Neb. 581, 48 N. W. 387; Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3.

where the parties have different interests of any sort in the same property, one can recover against the other no more than the value of his interest.[38] Thus in case of a lease of rolling stock to a railroad, with agreement that the rental should be applied in payment of a purchase price, and all property of the railroad afterwards was mortgaged; this mortgage was foreclosed, the purchaser having notice of the lease; the lessor replevied, defendant gave bond and retained the property, and plaintiff had judgment; the court held that defendant was not answerable for the whole value, since he had a qualified interest in the property, that is, the interest under the lease. The amount of rent paid under the lease, since it went toward the purchase money of the property, was to be deducted from the value.[39] So, where a person wrongfully appointed receiver replevied the goods from the owner and got possession, and was afterwards rightly appointed receiver, it was held that though he must fail in the replevin suit this should be considered in the amount of damages, since the recovery must be proportioned to the actual interest of the successful party.[40]

On this principle, where a mortgagee succeeds against the mortgagor or a person claiming under him, he can recover no

Wisconsin: Battis *v.* Hamlin, 22 Wis. 669.

The sheriff cannot get the amount of executions which came to his hands after the goods had been taken from his possession by the replevin writ. Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. 149; Sloan *v.* Coburn, 26 Neb. 607, 42 N. W. 726.

Where the sheriff has levied upon partnership property for the individual debt of a partner, and the property is replevied, the extent of his recovery is the value, at the time of the levy, of the beneficial interest of the execution defendant in such property, on accounting and settlement of the partnership business. Donellan *v.* Hardy, 57 Ind. 393; Ferguson *v.* Day (Ind. App.), 33 N. E. 213.

[38] *Iowa:* Peck *v.* Bonebright, 75 Ia. 98, 39 N. W. 213 (purchaser and seller of goods).

North Carolina: Barham *v.* Massey, 5 Ire. 192 (tenant for life of slave and remainderman).

Pennsylvania: Woods *v.* Klein, 223 Pa. 257, 72 Atl. 523 (owner subject to liens).

Wisconsin: Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467, 51 Am. Rep. 718 (vendor and purchaser).

Where one partner wrongfully by replevin took the property from the hands of the other, the full value of the property should be assessed against him, since to assess the value of his interest would involve a full partnership accounting. Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90.

[39] Collins *v.* Bellefonte Central R. R., 171 Pa. 243, 33 Atl. 331.

[40] Guy *v.* Doak, 47 Kan. 366, 27 Pac. 968.

more than the amount of the mortgage debt;[41] and where he fails, he is liable for no more than the excess of the value of the property over his claim.[42]

Where on the other hand the controversy is between the possessor of goods and a stranger the mere possessor, whatever his interest, is entitled to the full value of the goods.[43]

§ 532. Plaintiff bound by valuation in writ.

It has been held in England and in the United States, that the plaintiff in the replevin suit is bound by the estimate of the property made by himself.[44] The defendant, however, is not bound by the valuation in the writ,[45] nor in an action on a replevin bond is the value of the property fixed by the value stated in the undertaking given by the party replevying.[46]

[41] Against mortgagor:

Missouri: Dillard *v.* McClure, 64 Mo. App. 488.

Wisconsin: Smith *v.* Philips, 47 Wis. 202, 2 N. W. 285.

Against junior mortgagee:

Montana: Schwab *v.* Owens, 10 Mont. 381, 25 Pac. 1049.

Wisconsin: Klinkert *v.* Fulton, S. & M. Co., 113 Wis. 493, 89 N. W. 507.

Against purchaser from mortgagor: Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

Contra, however, of an attaching creditor of the mortgagor, who appears to have been treated as a stranger: Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313.

[42] Recovery by mortgagor: Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835.

By attaching sheriff in suit against mortgagor:

Kansas: Moore *v.* Shaw, 1 Kan. App. 103, 40 Pac. 929.

Wisconsin: Saxton *v.* Williams, 15 Wis. 292.

[43] *Dakota:* Madison Nat. Bank *v.* Farmer, 5 Dak. 282, 40 N. W. 345 (mortgagee).

Nebraska: Merchants' Bank *v.* McDonald, 63 Neb. 363, 377, 88 N. W. 492 (sheriff).

New York: Hanover Nat. Bank *v.* American D. & T. Co., 14 App. Div. 255, 43 N. Y. Supp. 544 (pledgee).

[44] *California:* Schmidt *v.* Nunan, 63 Cal. 371.

Maine: Tuck *v.* Moses, 58 Me. 461; Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

Nebraska: Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3.

New York: Tiedman *v.* O'Brien, 36 N. Y. Super. Ct. 539.

Oklahoma: Brook *v.* Bayless, 5 Okla. 568, 52 Pac. 738.

England: Middleton *v.* Bryan, 3 M. & S. 155.

But in Briggs *v.* Wiswell, 56 N. H. 319, it was said the value in the writ of replevin is *prima facie* evidence against the plaintiff on the trial.

[45] *Maine:* Thomas *v.* Spofford, 46 Me. 408; Tuck *v.* Moses, 58 Me. 461.

Tennessee: Goodman *v.* Floyd, 2 Humph. 59.

[46] *United States:* Sweeney *v.* Lomme, 22 Wall. 208, 22 L. ed. 727.

New Jersey: West *v.* Caldwell, 23 N. J. L. 736.

§ 533. Value, when to be estimated.

The value of the property is to be found in some cases at the time of the wrongful taking, in others at the time of the trial, according to whether damages are given for the conversion, or a sum of money is named as a substitute for the property.

In some jurisdictions it is in the option of the defendant by giving a bond to answer for damages to keep the property and turn the action into a mere action for damages for the conversion of the goods. Where this practice prevails, the value of the property is allowed as damages for the conversion, and is therefore to be found as of the time of the conversion by the defendant. So, in actions in the *detinet*, as it is called, that is, actions in which the property was eloigned or put by the defendant out of the sheriff's reach, so that it could not be restored by the sheriff to the plaintiff at the outset of the proceedings, the judgment cannot be for the property, since that is eloigned; it can only be for its value. The action becomes one for the conversion of property. Finally, when the plaintiff himself elects not to have the property taken on the writ though he is entitled to have it so taken, the action is in substance an action for the conversion of the property. In all these cases the measure of damages is the value of the property at the time of the demand by the sheriff,[47] or, in those jurisdictions following that rule, the highest value between that time and the trial.[48]

But where the property was taken by the plaintiff at the beginning of the suit, and judgment is in favor of the defendant

[47] *California:* Hisler *v.* Carr, 34 Cal. 641.

Georgia: Smith *v.* Duke, 6 Ga. App. 75, 64 S. E. 292.

Indiana: Yelton *v.* Slinkard, 85 Ind. 190; Peters B. & L. Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.

Iowa: Neeb *v.* McMillan, 98 Ia. 718, 68 N. W. 438.

Kansas: Garrett *v.* Wood, 3 Kan. 231; Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482.

Minnesota: Sherman *v.* Clark, 24 Minn. 37; McLeod *v.* Capehart, 49 Minn. 187, 52 N. W. 381.

Missouri: Pope *v.* Jenkins, 30 Mo. 528 (but *contra*, Miller *v.* Bryden, 34 Mo. App. 602, value at time of trial).

Nebraska: Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100.

New Jersey: Maguire *v.* Dutton, 54 N. J. L. 597, 25 Atl. 254.

Pennsylvania: Woods *v.* Klein, 223 Pa. 257, 72 Atl. 523.

Texas: Norwood *v.* Interstate Nat. Bank, 92 Tex. 268, 48 S. W. 3.

Wisconsin: Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436.

[48] Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102.

for a return, the value is found as an alternative for the property in case the plaintiff fails to return it. For instance, in those jurisdictions permitting such a practice, where the defendant, upon proving his right, is allowed to elect between a return of the goods or their value, or, in any jurisdiction where, upon a judgment for a return of the property, it cannot be found by the sheriff, the value of the property stands for the property itself. If the defendant elects to take the value, or if the verdict is given in the alternative for the property or its value, the value is to be assessed at the time of the trial; [49] if judgment is given for a return, and, the sheriff not being able to find the property, damages are assessed on the bond, the value is to be taken at the time of the demand under the writ of restitution.[50] The same rule prevails where under the procedure of the jurisdiction the plaintiff is not entitled to be given the possession at the beginning of the suit, but eventually obtains judgment.[51]

In a few jurisdictions, where judgment is given for a return,

[49] *Iowa:* Bonnot Co. *v.* Newman, 109 Ia. 580, 80 N. W. 655.

Maryland: Hepburn *v.* Sewell, 5 H. & J. 211, 9 Am. Dec. 512.

Mississippi: Selser *v.* Ferriday, 13 S. & M. 698.

Missouri: Miller *v.* Whitson, 40 Mo. 97, 93 Am. Dec. 299; Chapman *v.* Kerr, 80 Mo. 158; Mix *v.* Kepner, 81 Mo. 93; Kreibohm *v.* Yancey, 154 Mo. 67, 87, 55 S. W. 260; Hutchins *v.* Buckner, 3 Mo. App. 595; Hinchey *v.* Koch, 42 Mo. App. 230; Trimble *v.* Keer R. M. Co., 56 Mo. App. 683; Schnabel *v.* Thomas, 98 Mo. App. 197, 71 S. W. 1076.

New York: Brewster *v.* Silliman, 38 N. Y. 423; New York G. & I. Co. *v.* Flynn, 55 N. Y. 653 (but Brizsee *v.* Maybee, 21 Wend. 144, is *contra*); Ditmars *v.* Sackett, 81 Hun, 317, 30 N. Y. Supp. 721.

North Carolina: Scott *v.* Elliott, 63 N. C. 215; Holmes *v.* Goodwin, 69 N. C. 467, 12 Am. Rep. 657.

Texas: Morris *v.* Coburn, 71 Tex. 406, 10 Am. St. Rep. 753; Avery *v.* Dickson (Tex. Civ. App.), 49 S. W. 662. See, however, a different rule in Michigan and Nebraska, § 764, *infra*.

Where, however, the defendant in his answer did not ask for a return, but only for damages for the taking, he is confined to the value at the time of taking, *i. e.*, at the date of the writ. John Blaul & Sons *v.* Wandel, 137 Ia. 301, 114 N. W. 899.

[50] *Maine:* Howe *v.* Handley, 28 Me. 241; Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

Massachusetts: Swift *v.* Barnes, 16 Pick. 194.

[51] *Missouri:* Jennings *v.* Sparkman, 48 Mo. App. 246.

Nevada: Gardner *v.* Brown, 22 Nev. 156, 158, 37 Pac. 240.

New York: National Cash Register Co. *v.* Agne, 43 App. Div. 605, 60 N. Y. Supp. 348.

North Carolina: Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

Oklahoma: Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

the damages are to be estimated as of the date of taking.[52] In Tennessee the value of the property is estimated at the time of the replevin writ. In addition, if the property have increased in value since the seizure, and remain at the time of the trial at a higher point than when seized, the difference must be allowed the defendant as damages for the detention; if the value be greater at the trial than it had been at the seizure, but the increase be temporary, it will be left to the jury to allow the temporary increase as damages or not.[53]

§ 534. Value increased by labor of defeated party.

Where a return of the chattels in their condition at the time of the taking cannot be had—their original value having been increased through labor of the defendant bestowed on them in good faith—the measure of the plaintiff's recovery does not now usually include the additional value.[54] So in replevin for a yacht, a defendant who claimed her under a purchase was allowed, in Massachusetts, to show the amount of his expenditures in improving her after his purchase and before the service of the writ.[55] But if the wrongful taking was wilful, the increased value is the measure of damages.[56] So in replevin

[52] *Iowa:* Neeb *v.* McMillan, 98 Iowa, 718, 68 N. W. 438; Becker *v.* Staab, 114 Iowa, 319, 86 N. W. 305.

New Jersey: Schintzer *v.* Russell, 80 Atl. 938.

Oklahoma: George R. Barse L. S. C. Co. *v.* McKinster, 10 Okla. 708, 64 Pac. 14. (See Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.)

[53] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 117.

[54] *Arkansas:* Eaton *v.* Langley, 56 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; Randleman *v.* Taylor, 94 Ark. 511, 127 S. W. 723.

Indiana: Peters B. & L. Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.

Kentucky: Strubbee *v.* Cincinnati Ry., 78 Ky. 481, 39 Am. Rep. 251.

Mississippi: Heard *v.* James, 49 Miss. 236; Acre *v.* Bufford, 80 Miss. 565, 31 So. 899.

Nebraska: Baker *v.* Meisch, 29 Neb. 227, 45 N. W. 685; Carpenter *v.* Lingenfelter, 42 Neb. 728, 60 N. W. 1022.

Nevada: Buckley *v.* Buckley, 12 Nev. 423.

New York: Sommer *v.* Adler, 36 App. Div. 107, 55 N. Y. Supp. 483.

Pennsylvania: Herdic *v.* Young, 55 Pa. 176, 93 Am. Dec. 739.

Wisconsin: Single *v.* Schneider, 30 Wis. 570, 24 Wis. 299; Hungerford *v.* Redford, 29 Wis. 345.

[55] Veazie *v.* Somerby, 5 All. (Mass.) 280.

[56] *Arkansas:* Nashville Lumber Co. *v.* Barefield, 93 Ark. 353, 124 S. W. 758.

Michigan: Nitz *v.* Bolton, 71 Mich. 388, 39 N. W. 15.

Mississippi: Heard *v.* James, 49 Miss. 236; Peterson *v.* Polk, 67 Miss. 163, 6 So. 615.

against a purchaser of logs from a homestead claimant, the purchase being made with knowledge that the title is in controversy, the purchaser cannot be allowed for his expenses in cutting the logs.[57]

§ 535. Damages for detention.

Damages for detention are assessed to the time of the verdict,[58] and they may be given in an action on the replevin bond, although not previously assessed.[59] In Illinois it has been held, where there was no proof of actual damage, to be error for a jury to assess the damages at $50. In such a case only nominal damages can be recovered.[60] In a case in Texas it was held that, as a general rule, no damages could be given for detention, the value of the property at the time of the "conversion," with interest, being the measure of damages.[61] In this case the court obviously confused the action with the action of trover. The

[57] Cunningham *v.* Metropolitan S. Co., 110 Fed. 332.

[58] *Arkansas:* Lesser *v.* Norman, 51 Ark. 301.

California: Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546; Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409.

Iowa: McIntire *v.* Eastman, 76 Ia. 455, 41 N. W. 162; Newberry *v.* Gibson, 125 Ia. 575, 101 N. W. 428.

Kansas: Chase County Nat. Bank *v.* Thompson, 54 Kan. 307, 38 Pac. 274.

Kentucky: Cooper *v.* Ratliff (Ky. L. Rep.), 116 S. W. 748.

Missouri: Reno *v.* Kingsbury, 39 Mo. App. 240.

Nebraska: Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085 (explaining earlier cases).

New Hampshire: Kendall *v.* Fitts, 22 N. H. 1; Messer *v.* Bailey, 31 N. H. 9.

New Jersey: Maguire *v.* Dutton, 54 N. J. L. 597, 25 Atl. 254.

New Mexico: Hyde *v.* Elmer, 14 N. Mex. 39, 88 Pac. 1132.

North Carolina: Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

North Dakota: Nichols & Shepard Co. *v.* Paulson, 10 N. D. 440, 87 N. W. 977.

Pennsylvania: Harrisburg E. L. Co. *v.* Goodman, 129 Pa. 206, 19 Atl. 844. Swope *v.* Crawford, 16 Pa. Super. Ct. 474.

Contra, California: Compressed A. M. Co. *v.* West, S. P. L. & W. Co., 9 Cal. App. 361, 99 Pac. 531 (to date of writ only).

Oklahoma: George R. Barse L. S. C. Co. *v.* McKinster, 10 Okla. 708, 64 Pac. 14. (But see Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.)

Where the right of the successful party ended during the litigation (as by foreclosure of a mortgage) damages for detention can be obtained only up to the time when the right came to an end. Gaar Scott & Co. *v.* Lyon, 99 Ky. 672, 37 S. W. 73.

Of course, no damages for detention can be allowed unless there is a finding that the party claiming them is entitled to possession. J. E. McMillan Hardware Co. *v.* Ross, 24 Okla. 696, 104 Pac. 343.

[59] Smith *v.* Dillingham, 33 Me. 384; Washington Ice Co. *v.* Webster, 62 Me. 341.

[60] Seabury *v.* Ross, 69 Ill. 533.

[61] Gillies *v.* Wofford, 26 Tex. 76.

rules governing the measure of damages in the two are, however, entirely different.

In Michigan and Nebraska it is held that if the prevailing party elects to take the value of the property instead of asking for a return, he can have no damages for detention of the property, but only the value at the time of the taking, with interest.[62] In Romberg *v.* Hughes [63] the court said:

"It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself and not its value. In such case when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon." But in the later case of Schrandt *v.* Young [64] this rule was restricted to claims for deterioration or depreciation after the taking.

Where this rule is adopted, the peculiar action of replevin becomes, upon the election of the prevailing party to take the value of the property, exactly like an action of trover, and the same rule of damages is adopted.

§ 536. Decrease in value.

Where the goods depreciated in value or suffered injury during the period of detention, the successful party can always recover the amount of the depreciation in value as damages for detention.[65] It is unimportant whether such depreciation arise

[62] *Michigan:* Hanselman *v.* Kegel, 60 Mich. 540; Just *v.* Porter, 64 Mich. 565; Nitz *v.* Bolton, 71 Mich. 388.

Nebraska: Hainer *v.* Lee, 12 Neb. 452; Aultman *v.* Stichler, 21 Neb. 72.

[63] 18 Neb. 579, 582.

[64] 62 Neb. 254, 86 N. W. 1085.

[65] *Colorado:* Rice *v.* Cassells, 47 Cal. 72, 108 Pac. 1001.

Illinois: Dalby *v.* Campbell, 26 Ill. App. 502; Glow *v.* Yount, 93 Ill. App. 112; McDonough *v.* Reilly, 131 Ill. App. 553.

Indiana: Yelton *v.* Slinkard, 85 Ind. 190.

Kansas: Russell *v.* Smith, 14 Kan. 366; Bowersock *v.* Adams, 59 Kan. 779, 54 Pac. 1064.

Maine: Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

from the defendant's act or default, or not;[66] nor need there be a special averment of this cause of damage to sustain a recovery on this ground.[67] But the plaintiff who retains the articles replevied till judgment in the suit, cannot, if he succeed, claim damages for the depreciation in their value; because he may always convert them into money.[68]

In accordance with the general principle, where plaintiff replevied a cat which at the time defendant took it was in good health, but when he recovered possession it was dying, he could recover the difference in value between the cat in good health and the cat dying.[69]

§ 536a. Loss of the property pending litigation.

In case of death during the pendency of the litigation without the fault of the holder, it is held that the successful litigant

Michigan: Aber *v.* Bratton, 60 Mich. 357.

Missouri: Baldridge *v.* Dawson, 39 Mo. App. 527; Hinckey *v.* Koch, 42 Mo. App. 230; Trimble *v.* Keer, Rountree Mercantile Co., 56 Mo. App. 683; Cummings *v.* Badger Lumber Co., 130 Mo. App. 557, 109 S. W. 68.

Nebraska: Hooker *v.* Hammill, 7 Neb. 231; Moore *v.* Kepner, 7 Neb. 291; Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

New York: Rowley *v.* Gibbs, 14 Johns. 385; Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Supp. 837; Pabst Brewing Co. *v.* Rapid S. F. Co., 56 Misc. 445, 107 N. Y. Supp. 163.

North Carolina: Boylston Ins. Co. *v.* Davis, 70 N. C. 485; Harrison *v.* Chappell, 84 N. C. 258; Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

Wisconsin: Zitske *v.* Goldberg, 38 Wis. 216; Klinkert *v.* Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. 507; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436.

So of notes of third parties. Sullivan *v.* Sullivan, 20 S. C. 509.

In Commerce Exchange Nat. Bank *v.* Blye, 123 N. Y. 132, 25 N. E. 208, where defendant kept the property on giving a bond, he was held not responsible for deterioration in value during the litigation, without his fault, since his possession under the bond was legally valid.

[66] Depreciation from the fault of the party may of course always be recovered. Riley *v.* Littlefield, 84 Mich. 22, 47 N. W. 576.

[67] Young *v.* Willet, 8 Bosw. 486; but in Odell *v.* Hole, 25 Ill. 204, an action for the replevin of a mare, it was said that damages for *natural* depreciation could not be recovered where damages for use of the property were given; but even in that case damages could be recovered for depreciation caused by the default of the party in the wrong. And see Roseerans *v.* Asay, 49 Neb. 512, 68 N. W. 627.

[68] Gordon *v.* Jenney, 16 Mass. 465.

[69] Taylor *v.* Welsh, 138 Ill. App. 190. The condition of the cat appears presumably to have been chargeable to the defendant; if it were dying from natural causes without the defendant's fault this would result in giving greater damages where the cat was returned dying than when it was already dead. *Post*, § 536*a*.

cannot recover damages for such loss.[70] If the loss happened through the default of the defendant, he is of course responsible.[71] There seems no reason why the same rule should not apply to the loss of other property by inevitable accident; but it has been held in such a case that the possessor must answer for its value, though the loss happened without his fault.[72] At any rate, where the goods are taken from the possession of the unsuccessful party by a valid legal process for salvage, he is responsible to the successful party for the value of the goods.[73]

§ 537. Value of use.

If the owner of the goods was deprived of the use of them pending the replevin proceedings, he is entitled to the value of the use, if any.[74]

[70] Haile *v.* Hill, 13 Mo. 612 (slave); Pope *v.* Jenkins, 30 Mo. 528 (slave); Jennings *v.* Sparkman, 48 Mo. App. 246 (mule).

[71] Jennings *v.* Sparkman, 48 Mo. App. 246.

[72] Suppiger *v.* Gruaz, 137 Ill. 216, 27 N. E. 22. In this case the plaintiff was eventually unsuccessful. The court said that though the goods were taken on legal process, yet the plaintiff acted at his peril, since he had no valid claim.

[73] Three States Lumber Co. *v.* Blanks, 133 Fed. 479. And see Ackerman *v.* King, 29 Tex. 291.

[74] *Alabama:* Mobile E. L. Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Arkansas: Dunnahoe *v.* Williams, 24 Ark. 264; Minkwitz *v.* Steen, 36 Ark. 260.

Illinois: Butler *v.* Mehrling, 15 Ill. 488; Odell *v.* Hole, 25 Ill. 204.

Iowa: Turner *v.* Younker, 76 Ia. 258, 41 N. W. 10.

Kansas: Yandle *v.* Kingsbury, 17 Kan. 195, 22 Am. Rep. 275; Ladd *v.* Brewer, 17 Kan. 204; Bell *v.* Campbell, 17 Kan. 211; Kennett *v.* Fickel, 41 Kan. 211.

Maine: Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Crabtree *v.* Clapham, 67 Me. 326, 24 Am. Rep. 31.

Massachusetts: Boston Loan Co. *v.* Myers, 143 Mass. 446.

Michigan: Burt *v.* Burt, 41 Mich. 82; Aber *v.* Bratton, 60 Mich. 357.

Minnesota: Nash *v.* Larson, 80 Minn. 478, 83 N. W. 451, 81 Am. St. Rep. 278.

Missouri: Reno *v.* Kingsbury, 39 Mo. App. 240.

Montana: Morgan *v.* Reynolds, 1 Mont. 163; Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194.

New York: Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641.

North Carolina: Scott *v.* Elliott, 63 N. C. 215.

North Dakota: Northrup *v.* Cross, 2 N. D. 433, 51 N. W. 718.

Oregon: Coffin *v.* Taylor, 16 Ore. 375, 18 Pac. 658.

Tennessee: Stanley *v.* Donoho, 16 Lea, 492.

Texas: Robbins *v.* Walters, 2 Tex. 130.

Wisconsin: Williams *v.* Phelps, 16 Wis. 81; Zitske *v.* Goldberg, 38 Wis. 216.

Contra, New York: Twinam *v.* Swart, 4 Lans. 263.

In a few cases where under local practice the action becomes one for conversion the rule in trover is fol-

This doctrine is often applied in the case of animals which are of use,[75] but it extends as well to all articles which have an actual usable value.[76] It is sometimes said that the value of the use is normally measured by interest on the value of the goods, but if there is an actual usable value exceeding this, the successful party has the option of demanding it.[77] This however seems to be an inversion of thought; the party has lost the use of his property, and should recover compensation for such loss, but if he cannot prove the actual value of the use the rule of certainty provides for measuring the use by interest on the value.[78]

lowed, and the value of the use refused.

Iowa: Colean Implement Co. *v.* Strong, 126 Ia. 598, 102 N. W. 506.

Nebraska: Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100.

Texas: Huckins *v.* Lightner, 4 Tex. Civ. App. 38, 14 S. W. 1016.

[75] *Horse:*

Indiana: Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125.

Iowa: Hartley State Bank *v.* McCorkell, 91 Ia. 660, 60 N. W. 197.

Michigan: Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60.

Missouri: Cook *v.* Clary, 48 Mo. App. 166.

Colt: Van Horn *v.* Redman, 75 Ia. 421, 39 N. W. 679.

Mule:

Kentucky: Roach *v.* Houston, 15 Ky. L. Rep. 61.

Missouri: Jennings *v.* Sparkman, 48 Mo. App. 246.

Cow: Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35.

Slave:

Kentucky: Hall *v.* Edrington, 8 B. Mon. 47.

Texas: Clapp *v.* Waters, 2 Tex. 130.

[76] *Connecticut:* Adams *v.* Wright, 74 Conn. 551, 51 Atl. 53 (lunch wagon).

Florida: Ocala F. & M. Works *v.* Lester, 49 Fla. 199, 38 So. 51 (dummy engine).

Minnesota: Williams *v.* Wood, 61 Minn. 194, 63 N. W. 492 (threshing machine).

Missouri: Baldridge *v.* Dawson, 39 Mo. App. 527 (furniture).

Montana: Chauvin *v.* Valiton, 8 Mont. 451, 466, 20 Pac. 658, 3 L. R. A. 194 (piano).

New York: Crossley *v.* Hojer, 11 Misc. 57, 32 N. Y. Supp. 837 (furniture).

Texas: Stell *v.* Paschall, 41 Tex. 640 (cotton press); Mineralized Rubber Co. *v.* Cleburne, 22 Tex. Civ. App. 621, 56 S. W. 220 (fire hose).

Utah: Farrand & V. O. Co. *v.* Board of Church Extension, 17 Utah, 469, 54 Pac. 818, 70 Am. St. Rep. 810 (organ).

[77] *Missouri:* Reno *v.* Kingsbury, 39 Mo. App. 240.

Nebraska: Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

Utah: Farrand & V. O. Co. *v.* Board of Church Extension, 17 Utah, 469, 474, 54 Pac. 818.

This is especially emphasized and the distinction drawn in the case of work-horses:

Colorado: Johnson *v.* Bailey, 17 Colo. 59; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Iowa: Hartley State Bank *v.* McCorkell, 91 Iowa, 660, 60 N. W. 197.

[78] *Ante*, § 171*b*.

No compensation will be given except upon proof that the owner was actually deprived of the use by the replevin proceedings;[79] but it is not necessary to show that he procured a substitute for the property taken from him.[80] Where, however, a pledgee succeeds in his action of replevin against the pledgor he can recover no compensation for use, since he has no right to use the pledged property;[81] and the same is true where the prevailing party is a mortgagee after default.[82]

When the property was not used by the possessor, the deterioration which it would have suffered by use must be considered in determining the value of the use, and only the net loss will be allowed.[83]

§ 538. Interest as damages for detention.

Where property is held by the owner, not for continuing use, but for consumption or sale, it is evident that no compensation can be recovered for use of the property; yet he has suffered damage by the detention of the property from him. This damage, in cases where the value of the use cannot be recovered, is measured by interest on the value of the property detained.[84]

[79] *Colorado:* Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580 (cow in pasture).

Massachusetts: Bartlett *v.* Brickett, 14 All. 62.

Wisconsin: Barney *v.* Douglass, 22 Wis. 464; Klinkert *v.* Fulton S. & M. Co., 113 Wis. 493, 89 N. W. 507.

[80] Boston Loan Co. *v.* Myers, 143 Mass. 446.

[81] McArthur *v.* Howett, 72 Ill. 358, 22 Am. Rep. 149.

[82] Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619.

[83] *Alabama:* White *v.* Sheffield & T. S. Ry., 90 Ala. 253, 7 So. 910.

Minnesota: Peerless Machine Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260.

Montana: Brunell *v.* Cook, 13 Mont. 497, 34 Pac. 1015, 40 Am. St. Rep. 459.

[84] *United States:* Sleppy *v.* Bank of Commerce, 8 Sawy. 17.

Arkansas: Kelly *v.* Altemus, 34 Ark. 184, 34 Am. Rep. 6.

Colorado: Hanauer *v.* Bartels, 2 Colo. 514.

Iowa: Hurd *v.* Gallaher, 14 Ia. 394 (see Bonnot Co. *v.* Newman, 109 Ia. 580, 80 N. W. 655).

Kansas: Yandle *v.* Kingsbury, 17 Kan. 195 (*semble*); Ladd *v.* Brewer, 17 Kan. 204; Bell *v.* Campbell, 17 Kan. 211; Palmer *v.* Meiners, 17 Kan. 478.

Maine: Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

Massachusetts: Wood *v.* Braynard, 9 Pick. 322; Stevens *v.* Tuite, 104 Mass. 328.

Minnesota: Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Missouri: Woodburn *v.* Cogdal, 39 Mo. 222; Reno *v.* Kingsbury, 39 Mo. App. 240.

Nevada: Blackie *v.* Cooney, 8 Nev. 41.

New York: Brizsee *v.* Maybee, 21 Wend. 144; Redmond *v.* American Mfg. Co., 121 N. Y. 415, 24 N. E. 924; Earle

The presumption is that damages for detention are to be so measured.[85] But if damages by way of compensation for use are recovered, there can be no recovery of interest.[86]

So in replevin for grain, the measure of damages is interest on the value.[87] It is said that in replevin for certified bank checks, the damages are confined to interest on the amount.[88] So of a county warrant for the plaintiff's services.[89] But where the goods attached were subject to duties and the plaintiff paid them, it was held in an action on the replevin bond that the interest should be computed only on the difference between the amount so paid and the valuation in the writ of replevin.[90] Interest should be at the statutory rate; and this was held to be the case even where the property detained was a savings-bank book, and the bank paid less than the statutory rate of interest.[91] The value of the use of money is not limited by the

v. Gorham Manuf. Co., 2 App. Div. 460, 473, 37 N. Y. Supp. 1037.

North Carolina: Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745 (departing after a statutory change of procedure from the earlier practice *contra*, as shown in Scott *v.* Elliott, 63 N. C. 215; Potapsco *v.* Magee, 86 N. C. 350; but see Penny *v.* Ludwick, 152 N. C. 375, 67 S. E. 919).

Pennsylvania: McCabe *v.* Morehead, 1 W. & S. 513, 37 Am. Dec. 477; Collins *v.* Houston, 138 Pa. 481, 21 Atl. 234.

Tennessee: Mayberry *v.* Cliffe, 7 Cold. 117.

Wisconsin: Bigelow *v.* Doolittle, 36 Wis. 115; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Klinkert *v.* Fulton S. & M. Co., 113 Wis. 493, 89 N. W. 507.

England: Dreyfus *v.* Peruvian Guano Co., 42 Ch. D. 66.

Contra, that no interest can be given in absence of proof of actual value of the use: Miller *v.* Jones, 26 Ala. 247 (detinue). In Indiana it was said that interest on the value of the property might be allowed by way of damages in an action on the replevin bond. Walls *v.* Johnson, 16 Ind. 374.

[85] *Colorado:* Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Missouri: Reno *v.* Kingsbury, 39 Mo. App. 240.

Nebraska: Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

New York: New York G. & I. Co. *v.* Flynn, 55 N. Y. 653; Earle *v.* Gorham Mfg. Co., 2 App. Div. 460, 37 N. Y. Supp. 1037.

[86] *California:* Freeborn *v.* Norcross, 49 Cal. 313; Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 689, 63 Am. St. Rep. 131.

Kansas: McCarty *v.* Quimby, 12 Kan. 494.

Missouri: Reno *v.* Kingsbury, 39 Mo. App. 240.

Tennessee: Smith *v.* Roby, 6 Heisk. 546.

[87] Machette *v.* Wanless, 2 Colo. 169.

[88] Merchants' S. L. & T. Co. *v.* Goodrich, 75 Ill. 554. So of a note: Weaver *v.* Williams, 75 Miss. 945, 23 So. 649.

[89] McCoy *v.* Cornell, 40 Ia. 457.

[90] Huggeford *v.* Ford, 11 Pick. (Mass.) 223. See, also, Mattoon *v.* Pearce, 12 Mass. 406, 7 Am. Dec. 85.

[91] Wegner *v.* Second W. S. Bank, 76 Wis. 242, 44 N. W. 1096.

savings-bank rate, for the holder can withdraw his deposit at any time.

§ 539. Increase or income of the property.

The owner recovers not only the property, but any increase or income from it during the period of detention, as young born during the detention of a slave or animal,[92] wool clipped from sheep,[93] or dividends collected on stock while it was retained.[94] But it has been held in Nevada that the value of the wool from the sheep while detained could not be recovered unless pleaded as special damage.[95] And where compensation is recovered for the income from property, the specific cost of obtaining such income should be deducted.[96]

§ 540. Consequential damages.

It has been intimated, in Massachusetts, that if special damage were shown to have been suffered by the defendant, it might be allowed.[97] And where machinery in actual use in a factory was wrongfully replevied from the manufacturer, his damages were held [98] to include compensation for the general inconvenience and loss resulting from the interruption of his possession; [99] and compensation for the expense, trouble, and delay of restoring the property to its former condition.[100] So where a machine is taken to prevent the plaintiff from using it as a model for the construction of other machines, he may recover its value to him.[101] So, it has been held by the English

[92] *Mississippi:* Jordan *v.* Thomas, 31 Miss. 557.

Nevada: Buckley *v.* Buckley, 12 Nev. 423.

Oklahoma: Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

Texas: Morris *v.* Coburn, 71 Tex. 406, 8 Am. St. Rep. 611.

But see Houston *v.* Bibb, 5 Jones, (N. C.) Law 83.

[93] Harrison *v.* Ilgner, 74 Tex. 86.

[94] Bercich *v.* Marye, 9 Nev. 312.

[95] Buckley *v.* Buckley, 12 Nev. 423.

[96] Cunningham *v.* Stoner, 10 Idaho, 549, 79 Pac. 228 (cost of clipping wool from sheep).

[97] Barnes *v.* Bartlett, 15 Pick. 71; but in New York, the right of recovering special damages in this action has been doubted. Briszee *v.* Maybee, 21 Wend. 144; although if the analogy of trover be followed, they would probably now be allowed to a limited extent. See McDonald *v.* North, 47 Barb. 530.

[98] Stevens *v.* Tuite, 104 Mass. 328.

[99] *Acc.*, Davenport *v.* Ledger, 80 Ill. 574.

[100] *Acc.*, Zitske *v.* Goldberg, 38 Wis. 216.

[101] Berry *v.* Vantries, 12 S. & R. (Pa.) 89. This is really recovering the value of the use.

Court of Common Pleas, that special damages may be recovered in this action. "When the goods were not redelivered by the sheriff, according to the books, it would appear that the plaintiff could recover the full amount of the damages that he had sustained. . . . I see no reason in principle, why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know any ground in law, for confining the damages to the amount of the expenses of the replevin bond. In practice, these expenses are all that are recovered, merely because there is generally no other damage. . . . Whatever damages have been actually sustained may be recovered." [102] Where a plaintiff wrongfully replevied ice belonging to the defendant, it was held that the latter could recover the expense of procuring teams and appurtenances for the purpose of removing the ice, it having been actually incurred, and the teams, etc., having been rendered useless by the suing out the writ of replevin. It was held in this case that the defendant could not recover damages arising from a possible loss of customers, that being too indefinite, remote, and contingent to become an element of damage. It was said, also, that the plaintiff could not recover for a liability on outstanding contracts, since he could have replaced himself in the market.[103] Nor can he recover for loss of the profits of contracts which he has been unable to fulfil because his property was taken.[104]

It has been held that the owner may recover the expense of a reasonable attempt to recover the property,[105] but he cannot recover the expense of an ill-advised and ineffectual journey,

[102] Bovill, C. J., in Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 459.

[103] Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

[104] *Minnesota:* Williams *v.* Wood, 55 Minn. 323, 56 N. W. 1066, 61 Minn. 194, 63 N. W. 492.

Nebraska: Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

[105] *California:* Cain *v.* Cody, 29 Pac. 778.

New York: Bennett *v.* Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Davis S. M. Co. *v.* Best, 50 Hun, 76.

Wisconsin: Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191.

Contra, that travelling expenses are not allowed:

Dakota: Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

Illinois: Taylor *v.* Welsh, 138 Ill. App. 190.

Mississippi: Taylor *v.* Morton, 61 Miss. 24.

New York: Hampton & B. R. R. *v.* Sizer, 35 Misc. 391, 71 N. Y. Supp. 990.

South Carolina: Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1.

taken with the object of repossessing himself of the property after it was in the sheriff's hands without being prepared to take it by legal proceedings.[106] On the same principle it has been held that he may recover the expense of securing the return of the property,[107] of replacing it in its former position,[108] or of finding a necessary substitute for it.[109] But counsel fees and expenses of litigation undertaken for the purpose of securing the property cannot be recovered.[110] In Riley *v.* Littlefield [111] replevin was brought for a race-horse. It appeared that the horse had been entered in races, and on account of the seizure had not been able to race. By regulation of the association which carried on horse-racing, the owner of the horse was obliged to pay certain fines on account of the non-appearance of the horse at the races, or he would be allowed to enter in no more races. This, however, was held to be too remote for compensation.

§ 541. Sequestration proceeding in Louisiana.

In Louisiana, proceeding by sequestration is strongly analogous to the replevin or attachment of the common law, and the party plaintiff gives a bond with sureties "to pay all damages that may accrue in case it shall appear that the sequestration was wrongfully sued out." In a suit on such a bond, it has been decided in that State that the counsel fees of the first suit can be recovered on such bond; nor is it material to show that such

[106] *California:* Kelley *v.* McKibben, 53 Cal. 13.

Wisconsin: Barney *v.* Douglass, 22 Wis. 46.

[107] Leonard *v.* Maginnis, 34 Minn. 506.

[108] Byrnes *v.* Palmer, 113 Mich. 17, 71 N. W. 331.

[109] Adams *v.* Wright, 74 Conn. 551, 51 Atl. 53.

[110] *California:* Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481; Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395; Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409.

Dakota: Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

Florida: Gregory *v.* Woodbury, 53 Fla. 566, 43 So. 501.

Missouri: Trimble *v.* Keer R. M. Co., 56 Mo. App. 683; Howard *v.* Haas, 139 Mo. App. 591, 123 S. W. 1048.

New York: Cook *v.* Gross, 60 App. Div. 446, 69 N. Y. Supp. 924; Hampton & B. R. R. *v.* Sizer, 35 Misc. 391, 71 N. Y. Supp. 990; Sinskie *v.* Brust, 66 App. Div. 34, 72 N. Y. Supp. 922.

South Carolina: Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1.

Wyoming: Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

So the expense of securing a surety on the replevin bond cannot be recovered. Wilson *v.* Hillhouse, 14 Ia. 199, 81 Am. Dec. 465, *n.*

[111] 84 Mich. 22, 47 N. W. 576.

fees have been actually paid; it is enough that the plaintiff has incurred a liability for them.[112]

§ 542. Reciprocal damages.

* It is the peculiarity of this action, that both parties may be actors; and so if it is found that a part of the property claimed is the plaintiff's, and a part not, both plaintiff and defendant may recover damages against each other; [113] ** and also costs.[114]

[112] Jones *v.* Doles, 3 La. Ann. 588.

[113] *Kansas:* Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156.

Massachusetts: Powell *v.* Hinsdale, 5 Mass. 343.

[114] Knowles *v.* Pierce, 5 Houst. (Del). 178.

CHAPTER XXIV

ACTIONS AGAINST OFFICERS

§ 543. Ministerial officers responsible for violations of duty.
544. Actual injury furnishes the general rule.
545. General rule.
546. Burden of proof.
547. Nominal damages.
548. Mitigation.
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566. Suits between different officers.
567. Receiptors.
568. Illegal sale on execution.
569. Exclusion from office.

§ 543. Ministerial officers responsible for violations of duty.

* We shall now consider that class of cases which arise out of the acts of the public officers who are charged with the ministerial portion of the administration of government. It is well settled under the English system, that sheriffs and other ministerial officers in case of neglect or violation of duty, are responsible to the party aggrieved in a civil action.[1] The mode prescribed is usually one of the great class of actions on the

[1] Clark *v.* Miller, 47 Barb. 38, 54 N. Y. 528. Public officers, however, vested by law with discretionary authority, and acting within its scope, are not answerable in damages for the consequences of their acts, unless done maliciously and with intent to injure. Burton *v.* Fulton, 49 Pa. 151.

case; but the proceeding often takes the form of trespass. To this general remedy, which flows from the principles of the common law, is frequently superadded some special statutory relief, enforced by some particular penalty; but the addition of such particular remedy does not interfere in any way with the right of the party to his compensation for the actual injury done in a suit of trespass, or on the case.[2] ** Every public officer is required to give bonds with sureties for the proper discharge of his duties, and in some jurisdictions an action against an officer for wrongful acts in the discharge of his duties may be brought upon his bond, and often is so brought. It is evident that the measure of damages should in general be the same, whether the injured party brings an action of tort or resorts to the bond, the real cause of action being a tort in either case; and therefore actions brought upon official bonds are frequently authorities upon the subjects discussed in this chapter, and many such actions will be found herein. The peculiar questions which arise by reason of the action being brought upon the bond will be discussed later.[3]

§ 544. Actual injury furnishes the general rule.

* The ordinary cases in which the questions arise which we are now about to examine, are presented in suits against sheriffs or other ministerial officers, either for negligence, as the escape of parties arrested on mesne or final process, for taking insufficient security, for neglect to seize or preserve property on execution, or omission to make a true return to the writ; or, on the other hand, for an excess of their powers, as for levying upon property which they are not authorized to do so by the process, excessive distress, etc. And in these cases we shall find the general principle to be, although the form of the action

[2] As a general principle, it is well settled, in regard to all public officers, that although created by statute, and although liable to the infliction of penalties for violation of official duty, they are still equally responsible to the aggrieved party, in an action on the case. "Where the law," says the Supreme Court of Maine, "has affixed forfeitures for certain infractions thereof, or for neglects in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy which would exist if no penalties were prescribed." Hayes *v.* Porter, 22 Me. 371, 376; Beckford *v.* Hood, 7 T. R. 620; Farmers' Turnpike *v.* Coventry, 10 Johns. 389.

[3] See chap. xxxii, Bonds.

be in tort, that the party aggrieved is entitled, independent of any statutory relief, to recover only to the extent of his actual injury.[4]

It is not correct, however, says the Supreme Court of Vermont, to hold "that in actions of trespass for taking personal property, when the defendant is an officer acting under legal process, no damages can in any case be recovered beyond the actual value of the property. Courts usually in such cases instruct the jury that they ought to confine themselves within those limits. It is a rule of practice merely. Circumstances may require a departure from it." [5]

The rule is, indeed, subject to many modifications; partly arising from the vagueness that we have often had occasion to notice in the early cases; [6] partly from the variety of the forms of action employed; and partly from the application of the rules of evidence; and partly from the general principle that in actions of tort the intent, disposition, and conduct of the defendant always bear largely on the question of damages.[7]

[4] Pierce *v.* Strickland, 2 Story, 292; Dyer *v.* Woodbury, 14 Me. 546.

[5] Joyal *v.* Barney, 20 Vt. 154, 159; *acc.*, Dobbs *v.* The Justices, etc., 17 Ga. 624.

[6] Ravenscroft *v.* Eyles, Warden of the Fleet, 2 Wils. 294 (1776), is very strong to show the power which the courts originally gave in these cases to the jury. It was case for a voluntary escape; and the question being whether the action lay, the debtor having returned to custody before suit brought, and judgment having been recovered against him, Lord C. J. Wilmot said: "The *quantum* of damages is nothing to the purpose; for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper; *for this being an action upon the case, the damages were totally uncertain and at large.*"

In Sayer on Damages, 56, this case is stated to have been tried before Lord Camden, C. J.; that it was proved at the trial that the debt was *sperate;* and that on the argument, Bathurst, J., said: "Whether the debt was *sperate* or not, I take it to be a settled point, if the escape is a voluntary one, that it is the duty of the jury to assess damages to the amount of the whole debt." But by the report in 2 Wilson, above cited, no such point was made before the court on the subject of damages.

In Kent *v.* Kelway, case for rescue from arrest (Lane, 70; Sayer on Damages, 55), it is said that damages *may* be recovered to the amount of the debt for which the arrest was.

[7] In Bayley *v.* Bates, 8 Johns. 185, the Supreme Court of New York said: "An action for a false return sounds in tort and fraud, and it draws into consideration, in a greater or less degree, the *quo animo* of the defendant."

And these various questions we shall better understand by an examination of the cases.**

§ 545. General rule.

* As a general rule, however, it is settled that the measure of damages in suits of this class, brought against a public officer by a creditor plaintiff, whose remedy against his debtor has been impaired by the neglect or other misconduct of the officer, is the actual injury sustained, this actual injury being measured by the amount of the original debt due the plaintiff, or the value of the property, which has been lost or prejudiced by the neglect of the officer,** unless it is shown that the plaintiff's actual loss was less.[8]

§ 546. Burden of proof.

* It is an important question, where the breach of duty is clear, on whom does the proof of damage rest? Is the plaintiff to prove that he is damnified, or is the officer to disprove the fact? Our law, proceeding on a principle of evidence, throws the burden of proof on the negligent party, and assumes that the plaintiff is injured until the contrary appear. It might be urged that this should not be so, where there is mere ordinary negligence unaccompanied by any criminal intention; but as with common carriers, so with public officers, there are reasons, of controlling weight, why the party to whom a great trust is confided, and in whose hands usually all the testimony must

[8] *United States:* Jerman *v.* Stewart, 12 Fed. 266.

Alabama: Marcum *v.* Burgess, 67 Ala. 556.

California: Phelps *v.* Owens, 11 Cal. 22; Pelberg *v.* Gorham, 23 Cal. 349.

Georgia: Spain *v.* Clements, 63 Ga. 786.

Illinois: French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

Iowa: Plummer *v.* Harbut, 5 Ia. 308.

Kansas: Crane *v.* Stone, 15 Kan. 94.

Kentucky: Commonwealth *v.* Lightfoot, 7 B. Mon. 298.

Louisiana: Marshall *v.* Simpson, 13 La. Ann. 437; Bogel *v.* Bell, 15 La. Ann. 163.

Massachusetts: Whitaker *v.* Sumner, 9 Pick. 308.

Missouri: State *v.* Cobb, 64 Mo. 586.

Montana: Randall *v.* Greenhood, 3 Mont. 506.

New Hampshire: Goodrich *v.* Foster, 20 N. H. 177.

New York: Clark *v.* Miller, 54 N. Y. 528.

Pennsylvania: Hamner *v.* Griffith, 1 Grant, 193.

Texas: Hogan *v.* Kellum, 13 Tex. 396.

Vermont: Briggs *v.* Gleason, 29 Vt. 78; Blodgett *v.* Brattleboro, 30 Vt. 579; Parker *v.* Peabody, 56 Vt. 221.

Wisconsin: Beveridge *v.* Welch, 7 Wis. 465.

be, should be compelled to exculpate himself after a *prima facie* case of negligence is made out against him.[9]

There appears, however, to be a discrepancy on this point between the English and American rule. In England, it would seem, though it is by no means clear, that the plaintiff must show affirmatively that he could have collected his debt but for the negligence of the defendant.

The earliest case on this subject [10] runs thus: "An action upon the case against a sheriff, upon an escape suffered by his bailee upon a mesne process, and it was in evidence, as is necessary to make this case, that there was such a debt, that such a process and warrant was, and a due debt, and lastly, that the party arrested was become insolvent; otherwise he should not have recovered damages to the value of his debt, as he here did upon all this proved in evidence as aforesaid."

On the authority of this case, Mr. Peake [11] lays down the rule thus: "In order to show the amount of damages he has sustained, the plaintiff should also prove the circumstances of the defendant at the time of the arrest, and that he has since absconded, or become insolvent; for if the defendant were originally in bad circumstances, or he may be met with every day, and the plaintiff has not, in fact, been injured by the negligence of the defendant, the damages will be merely nominal." Mr. Starkie briefly says: [12] "The plaintiff must prove his debt and the damages which he has sustained from the sheriff's negligence."

In this country, it appears to be settled that the plaintiff, after proving his debt against the prisoner, the custody, and escape, is entitled to recover as his damages the amount of his debt, unless the officer can show that the defendant was insolvent, or in any other way prove that the plaintiff has sustained no actual loss.[13] "The body," says Mr. J. Cowen, in a case in New York,[14] "is considered the highest satisfaction in the law;

[9] Sheldon *v.* Upham, 14 R. I. 493.

[10] Tempest *v.* Linley, Clayton, 34.

[11] Norris' Peake, 608.

[12] Evidence—Sheriff—Escape. Vol. ii, 1016.

[13] *Indiana:* State *ex rel.* Shirk *v.* Mullen, 50 Ind. 598.

Maryland: State use of Goddard *v.* Baden, 11 Md. 317.

New York: Loosey *v.* Orser, 4 Bosw. 391.

[14] Patterson *v.* Westervelt, 17 Wend. 543, 548.

that is, for the time, gone by the sheriff's negligence, and it is doing no violence to say, that a defendant who would escape had *prima facie* secreted himself, or otherwise placed himself and property beyond the reach of execution."

In this case the question as to the burden of proof was distinctly presented. The sheriff of New York was sued for the escape of one Kelly, against whom the plaintiff had recovered a judgment for $10,722.98; the debt and escape being proved, Edwards, C. J., charged, that to entitle the plaintiff to recover beyond nominal damages, it was incumbent on him to show the extent of the injury sustained by him; and a verdict for such damages only, was accordingly rendered. On motion for a new trial, the court held the burden to be on the defendant, and granted a new trial; admitting, however, that their decision was at variance with the English rule; but insisting that it was not unreasonable to assume that the plaintiff had lost his debt by the defendant's negligence, until the contrary should be proved.**

§ 547. Nominal damages.

* It would seem, on the general principles which we have already considered, that even if it affirmatively appear that the plaintiff has sustained no damage, the officer guilty of a technical violation of duty would still be liable for nominal damages.** But a distinction was taken at a comparatively early day in England, between the liability of officers for default in the execution of writs of mesne and of final process, and which is sustained by a series of decisions. Where the writ relates to mesne process, it is held that, as it is uncertain whether the aggrieved party would recover at all against the original defendant, he can recover from the officer such damages only, as he can show he has sustained. But in an action on the case for the sheriff's omission to arrest the debtor, on final process, or for an escape on such process, although no actual damage be proved, he is held liable, in any event, to nominal damages. His negligence in this case deprives the plaintiff of the satisfaction which, after judgment, is in law imported by the possession of the debtor's body.[15] So in case

[15] Planck *v.* Anderson, 5 T. R. 37; Lewis *v.* Morland, 2 B. & Ald. 56; Scott *v.* Henley, 1 M. & Rob. 227.

for not executing a *ca. sa.*, the jury found that the sheriff was in default, but that the plaintiff had sustained no damage; and a verdict was entered for the defendant. But on argument, verdict was entered for the plaintiff, with nominal damages; Lord Denman saying: "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary." [16]

With the above exceptions of actions for not arresting a debtor on final process, or for allowing him to escape when held on such process, it seems to be settled in England, that civil actions against ministerial officers for neglect of duty, cannot be maintained, unless damage thereby accrues to the plaintiff, although the neglect affords a presumption of damage which must be disproved to entitle the defendant to a verdict. This has been held in actions against sheriffs, for the omission to seize goods to which the plaintiff has a present right of possession, or to execute a *capias*, or to levy under a *fi. fa.*, or for his making a false return.[17] The distinction thus

[16] Clifton *v.* Hooper, 6 Q. B. 468, 14 L. J. N. S. Q. B. 1. In an early case, where the sheriffs of Norwich sued the defendant, who had escaped by a rescue, on the ground of their liability over to I. S., at whose suit they arrested him, it was objected that the plaintiffs had not shown that they were charged, or in any way damnified; but the objection was held ill. Sheriffs of Norwich *v.* Bradshaw, Cro. Eliz. 53.

In Crompton *v.* Ward, 1 Str. 429, 436, it is said that the plaintiff has an interest, a sort of property, in the body of the prisoner, and sustains a damage by a rescue. But *what* damage is not said.

[17] Randell *v.* Wheble, 10 A. & E. 719; Hobson *v.* Thelluson, L. R. 2 Q. B. 642; Stimson *v.* Farnham, L. R. 7 Q. B. 175; Tancred *v.* Allgood, 4 H. & N. 438, 28 L. J. N. S. Ex. 362. The earlier cases were in conflict. In Powel *v.* Hord, 1 Strange, 650, an action for a false return on mesne process, the court held: "That if the defendant were a man of estate, and could still be taken, and so no damage, they should think the debt too much to give; but that *not being this case*," the jury found the whole debt as damages, with the opinion of the chief justice. And in Planck *v.* Anderson, 5 T. R. 37, it was held that the sheriff is not liable to an action for an escape on mesne process, if the jury find that the plaintiff has not been delayed or prejudiced in his suit. In Barker *v.* Green, 2 Bing. 317, case for not arresting J. W., it was held that though the plaintiff had sustained no actual damage, it was still a case for nominal damages, and the court refused to enter a nonsuit. But in Williams *v.* Mostyn, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and *it was admitted* that the plaintiff had sustained no *actual damage or delay*, the defendant having returned to the custody of the plaintiff, a verdict was found for

established in England, by which no liability attends the neglect of official duty unless the neglect results in positive loss to the person aggrieved, is founded on the assumption that the right of a suitor (or other person in a corresponding relation) to the officer's services, is in fact a right only to such pecuniary benefit as can be derived from them, and that if no such benefit can be obtained, no right exists. The exception has apparently been recognized in New York, in other cases than actions against sheriffs, and which seem to proceed upon such a distinction, though it was not in terms adverted to.[18] But although, owing to the abolition of imprisonment for a simple debt, the question loses its importance in reference to actions for the sheriff's neglect of duty, in those cases in which the defendant could formerly have been arrested as of course, we think the exception is to be regretted, both as anomalous, and as tending to laxity in the discharge of official duty. Under circumstances giving an officer no discretion, his failure to fulfil a positive duty for the benefit or protection of others should always be, in a legal sense, a wrong to the person in whose behalf the duty should have been discharged; and where there is a legal wrong there should always be a legal remedy. A right of action should accrue when the breach of duty is committed; and once existing, should not be destroyed by the circumstance that it afterwards proves to inflict no pecuniary damage.[19]

the plaintiff, with *nominal damages*. And on motion the court directed a *nonsuit* to be entered, saying, "that there had been *no damage in fact or law;*" and they disapproved of Barker *v.* Green. In Bales *v.* Wingfield, 4 Q. B. 580, where case was brought against the sheriff for neglecting to sell under a *fi. fa.* the writ was delivered to the sheriff, who seized on the 24th, and advertised a sale for the 6th of May; he did not, in fact, sell till the 27th. On the 15th of May a fiat in bankruptcy issued, and so the sheriff returned "no goods." The Q. B. held, that it lay on the plaintiff to show damage; and a verdict for nominal damages being entered, they refused to set it aside. But in Wylie *v.* Birch, 4 Q. B. 566, case for a false return, Lord Denman, C. J., assumed the principle, that the action could not be maintained against the sheriff for breach of duty, unless damage accrued thereby to the plaintiff, and cited the above cases; but said, also, that the breach of duty afforded presumption of some damage to the party who sets the sheriff in motion; and in such a case it seems still in England, that if the plaintiff offered no proof of actual injury, he would be entitled to nominal damages.

[18] Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Bridge *v.* Mason, 45 Barb. 37.

[19] Pelham *v.* Way, 15 Wall. 196, 21

In this country nominal damages at least are usually given for every breach of duty by a public officer.[20] So in case of neglect to return an execution, although no injury appear to have resulted, judgment will still be given for nominal damages.[21] So in a case in Massachusetts, against a sheriff for neglecting to return an execution, the Supreme Court of that State said: "The plaintiff is entitled to nominal damages for the officer's neglect. No actual damages are proved, but where there is a neglect of duty, the law presumes damages." [22]

§ 548. Mitigation.

* Where the plaintiff proceeds on account of the loss of a debt the original debt is, of course, the gist of the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff.[23] But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether, under any circumstances, it could have been collected of the defendant's property.[24] The question sometimes arises on mesne, and sometimes on final process.**

It also presents itself in other actions of this class. An officer who has attached property and taken a receipt for it, cannot show mitigation of damages, in an action brought for his not delivering the property or the receipt, that the property was worth less than the value alleged in his return.[25] But in case against a sheriff for illegally selling goods lawfully seized and held by him, and which had deteriorated without his default, the measure of damages is said, by the Supreme Court of Vermont, not to be their value when taken, but at the time of the sale.[26]

§ 549. Failure to levy.

For failure to levy the defendant is liable *prima facie* for the

L. ed. 55; Dow *v.* Humbert, 91 U. S. 294, 23 L. ed. 368.

[20] Metzner *v.* Graham, 66 Mo. 653. But *contra*, Dwyer *v.* Woulfe, 40 La. Ann. 46; Amperse *v.* Winslow, 75 Mich. 234, 13 Am. St. Rep. 432.

[21] Kidder *v.* Barker, 18 Vt. 454.

[22] Laflin *v.* Willard, 16 Pick. 64, 26 Am. Dec. 629. See also Goodnow *v.* Willard, 5 Met. 571.

[23] Gunter *v.* Cleyton, 2 Lev. 85; Alexander *v.* Macauley, 4 T. R. 611.

[24] Crooker *v.* Melick, 18 Neb. 227; Hellman *v.* Spielman, 19 Neb. 152.

[25] Allen *v.* Doyle, 33 Me. 420.

[26] Walker *v.* Wilmarth, 37 Vt. 289.

whole debt,[27] and conclusively so unless he can mitigate the amount by showing that he was unable to collect it by an exercise of proper diligence,[28] as, if the defendant in the execution was insolvent,[29] or the plaintiff himself have been the cause why the whole was not collected.[30] If, however, the land on which the defendant should have levied is worth less than the debt, the measure of damages is the value of the land,[31] and that value is to be measured by what the land would bring at a forced sale,[32] and not the amount agreed upon by the appraisers, as shown in the officer's return.[33] The sheriff may show in mitigation of damages, that the defendant in the execution had no property upon which he could have levied,[34] but *not* that the judgment is still collectible.[35] And in such an action the sheriff may show in mitigation that other executions in his hands would have taken the proceeds of a sale.[36] Where, in Ohio, the sheriff refused to levy on and sell under an execution in his hands, at the request of the plaintiff in the execution, certain personal property, which was wholly covered by mort-

[27] *Alabama:* Bondurant *v.* Lane, 9 Port. 484.

Maryland: Maccubbin *v.* Thornton, 1 Har. & McH. 194.

Massachusetts: Fairfield *v.* Baldwin, 12 Pick. 388.

New Hampshire: Sanborn *v.* Emerson, 12 N. H. 57.

New York: Bank of Rome *v.* Curtiss, 1 Hill, 275; People *v.* Lott, 21 Barb. 130; Humphrey *v.* Hathorn, 24 Barb. 278; Carpenter *v.* Doody, 1 Hilt. 465.

Pennsylvania: Commonwealth *v.* Contner, 18 Pa. 439.

Vermont: Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

And see *Ireland:* Simmonds *v.* Henchy, 16 L. R. Ire. 467.

But it is also held, that in declaring against a constable for failing to levy an execution, it is necessary to allege that the defendant in the execution had property on which the levy might have been made. The court says the officer was under no legal obligation to make the levy, unless the defendant had property at the time upon which to make it, and it was incumbent on the plaintiff to allege the fact in the declaration; and this correctly, for no such presumption exists on executions against property before levy, as on mesne process after arrest. State, use of Brooks *v.* Kirby, 6 Ark. 453.

[28] Dunphy *v.* People, 25 Mich. 10.

[29] Varril *v.* Heald, 2 Me. 91; *contra,* Crawford *v.* Word, 7 Ga. 445.

[30] Pardee *v.* Robertson, 6 Hill (N. Y.), 550.

[31] Hurlock *v.* Reinhardt, 41 Tex. 580. See Hamner *v.* Griffith, 1 Grant (Pa.), 193.

[32] Harris *v.* Murfree, 54 Ala. 161.

[33] Parker *v.* Peabody, 56 Vt. 221.

[34] *Alabama:* Abbot *v.* Gillespy, 75 Ala. 180.

New York: Ledyard *v.* Jones, 7 N. Y. 550.

[35] Ledyard *v.* Jones, 7 N. Y. 550.

[36] Forsyth *v.* Dickson, 1 Grant (Pa.), 26. But see Crawford *v.* Word, 7 Ga. 445.

gages to an amount far more than its value, it was held that there should be a verdict for nominal damages only.[37] The measure of damages in an action against a sheriff, for not selling a tract of land levied on under the foreclosure, is said to be the value of the land or the amount of the foreclosure, whichever was the less amount.[38] And where the sheriff levied upon a special interest in the land, instead of the fee, he was liable in damages for the entire amount of the execution or value of the land less the actual value of the execution, measured by the amount received from sale of the special interest.[39] But in an action for insufficient levy of execution on specific property, we have a different case. The loss is merely the loss to the creditor of the benefit of the specific property in question, which is obviously a mere question as to the value of specific property. As in every case, however, the plaintiff, suing for injury to specific property, must prove the value of the property; and in the absence of evidence of value he is entitled to nominal damages only.[40]

§ 550. Failure to attach.

Attachments are governed by the same rule as executions, and if the sheriff, knowing of property enough to satisfy the demand, fails to levy to that extent, he is liable for the deficiency as ascertained by the result of the sale. It does not excuse him that the property levied on was appraised at a sum sufficient to satisfy the debt.[41] In an action against the sheriff for neglect to levy an attachment, or levy and return an execution, the amount of the judgment or execution, or so much thereof as the value of the property which the officer neglected to attach would have been sufficient to satisfy, is the measure.[42] And where the value of the property lost by the neglect of the

[37] Coe *v.* Peacock, 14 Oh. St. 187; Coopers *v.* Wolf, 15 Oh. St. 523.

[38] Baker *v.* Bower, 44 Ga. 14; Blackman *v.* Clements, 45 Ga. 292.

[39] Richards *v.* Gilmore, 11 N. H. 493.

[40] Farmers' & M. Bank *v.* Maines, 183 Fed. 37.

[41] Ransom *v.* Halcott, 18 Barb. (N. Y.) 56.

[42] *Michigan:* People *v.* Colerick, 67 Mich. 362, 34 N. W. 683.

New Hampshire: Perkins *v.* Pitman, 34 N. H. 261.

New York: Bowman *v.* Cornell, 39 Barb. 69.

But see *Maine:* Wolfe *v.* Dorr, 14 Me. 104.

sheriff to execute the attachment equals or exceeds the amount of the plaintiff's demand, such amount becomes the measure of damages for which the sheriff and his sureties are liable.[43] So the damages should be reduced by the amount of property owned by the debtor at the time of the judgment, upon which the plaintiff might have levied.[44]

In Connecticut, it was originally decided that an officer who had been guilty of neglect in not serving mesne process should be liable for the whole debt; a rule which has been there characterized "as one of stern policy, rather than of exact justice;" and it is now well settled that the plaintiff can only recover the damages he has sustained. "But these damages it is peculiarly the duty of the jury to assess, and in so doing they are not limited to any precise sum; they may even give more than the plaintiff's original debt. Where that debt has been lost by the wilful misconduct or negligence of the officer, they may add to it the costs of a second suit; and as the jury may give more than the debt, so they may give less. If it should be found by them that the failure of the officer to return a writ was owing to a mere mistake, in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages." [45]

In North Carolina, in regard to mesne process, it has been said that the true inquiry is whether the debtor had any property which might, by due process, have been subject to execution, and whether the sheriff by his negligence has deprived the plaintiff of his remedy. But it is no answer for the sheriff to say that the debtor, even after being imprisoned, might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the plaintiff.[46] Nor on such process is the reputation of the defendant as an insolvent any excuse; the officer is bound to ascertain for himself whether there is any property to satisfy the writ.[47]

[43] Smith *v.* Tooke, 20 Tex. 750.

[44] Townsend *v.* Libbey, 70 Me. 162.

[45] Palmer *v.* Gallup, 16 Conn. 555, 41 Am. Dec. 158; Duryee *v.* Webb, cited in notes to this case. See Clark *v.* Smith, 9 Conn. 379, 23 Am. Dec. 361, as to previous rule. Gleason *v.* Chester, 1 Day, 152; Hubbard *v.* Shaler, 2 Day, 195.

[46] Sherrill *v.* Shuford, 10 Ired. (N. C.) 200.

[47] Parks *v.* Alexander, 7 Ired. (N. C.) 412; The State *v.* Edwards, 10 Ired. 242.

§ 551. Failure to arrest.

Where the sheriff fails to take the debtor's body on execution, he may show in mitigation of damages the insolvency of the debtor.[48] The actual loss must be proved.[49] Where a constable, having received a writ, with directions to arrest the defendant named in it, returned it unexecuted, under a mistaken idea that he was entitled to indemnity, and the defendant remained publicly living in the State for some months, and the plaintiff might have issued another writ and arrested him, it was held, in Vermont, that these facts should have been submitted to the jury in mitigation of damages.[50]

§ 552. Escape from arrest on execution.

* In England, a remedy was originally given by statute, in an action of debt against the sheriff for the escape of prisoners charged in execution; and this statute has been re-enacted to some extent in this country. But under it no question could arise as to the measure of damages; for, the action being debt, and the provisions of the statute being peremptory, the officer was charged with the whole amount of the plaintiff's original claim, as ascertained by his judgment. Our present inquiry is directed to the measure of damages in the action on the case, or in trespass.[51] ** And the only remedy that existed in England prior to the abolition of forms of action against a sheriff for escape on final process, was an action on the case for such damages as the plaintiff may have sustained by reason of such escape.[52]

* When a prisoner for debt makes an escape [53] (says Lord Kaims), "the creditor is hurt in his interest, but sustains no actual damage; for it is not certain that he could have recovered his money by detaining the debtor in prison, and it is possible he may yet recover it, notwithstanding the escape. But it is undoubtedly a hurt or prejudice to be deprived of his expectation to obtain payment by the imprisonment; and the common

[48] Dinninny *v.* Fay, 38 Barb. (N. Y.) 18.

[49] *Alabama:* Pugh *v.* McRae, 2 Ala. 393.

Canada: Chapman *v.* Doherty, 25 N. B. 271.

[50] Blodgett *v.* Brattleboro, 30 Vt. 579.

[51] Bonafous *v.* Walker, 2 T. R. 126; Rawson *v.* Dole, 2 Johns. 454.

[52] 5 & 6 Vict., chap. 98, § 31; Arden *v.* Goodacre, 11 C. B. 371.

[53] Prin. of Equity, book i, chap. iv, § 5, ed. of 1767, p. 159.

law gives reparation by making the negligent jailor liable for the debt, precisely as equity doth in similar cases. A messenger who neglects to put a caption in execution, affords another instance of the same kind." This appears, Lord Kaims observes, to be the infliction of uncertain consequential damage.**

§ 553. Value of custody the rule in England.

* In a case in England, the Court of Common Pleas said, that they had not been able to find any decision in which the rule as to the measure of damages was clearly defined. The principal case was one in which it was endeavored to reduce the liability of the sheriff by showing, where an escape from final process had taken place, that the plaintiff might, by diligence, have re-arrested or detained the defendant, and recovered his debt. But this was denied; and it was declared that the true measure of damages is the value of the custody of the debtor at the moment of the escape; [54] that if, at the time of the escape, the debtor had not the means of satisfying the judgment, the plaintiff loses only the security of the debtor's body, and the damage may be small. If, on the other hand, at the time of the escape, the debtor could pay, and has wasted his means since then, it being clear that the loss of the debt is owing to the sheriff's neglect, the jury would be justified in giving the full amount of the execution.[55]

But it is plain that this still leaves the whole subject at very loose ends. What is meant by the value of the security of the body of a debtor? Are his physical and mental qualifications to be gone into, and the chance of his subsequently acquiring property, to be estimated? Are the chances of his friends being induced or coerced, by reason of his imprisonment, into paying the debt, to be inquired of? Again, what can be more vague than, in a matter of this kind, to say that "*the damages may be small.*" Nor, on the other hand, even if the debtor is solvent, is the liability of the sheriff to pay the debt declared as matter of law. It is simply said that the jury would be "*justified in giving the full amount of the execution.*" And the question on whom the burden of proof as to the debtor's pecuniary condition falls, is not alluded to.**

[54] McRae *v.* Dunlop, 3 Russ. & Gel. (N. S.) 315.

[55] Arden *v.* Goodacre, 11 C. B. 371.

In a case in chancery, it was said that the burden was on the defendant to show that the loss was not the amount of the debt.[56] In a case in the English Common Pleas, it was held that the jury might, in estimating the value of the custody, consider "the value to the plaintiff of the chance that the debt, or any part of it, would have been extracted by the debtor's remaining in prison," and the fact of an offer of the debtor's solicitor, some time before his arrest, to pay a certain amount in composition of his debts.[57]

§ 554. American rule.

In this country there has been particularly in the older cases, a tendency to hold the sheriff responsible for the full amount of the execution.[57a] So in New York, where one was arrested on a precept of the surrogate's court for failure to account, and was suffered to escape, the measure of damages under the Code was held to be the sum awarded by the surrogate's decree, with interest, and the insolvency of the delinquent could not be shown in mitigation.[58] It has long been well understood and universally recognized in Vermont that an officer who holds penal process against a debtor upon whom he may serve it, but who omits to do so, or having once had an opportunity to arrest the debtor, neglects to do it, and the debtor afterwards absconds, becomes *fixed with the debt;* and, of course, no evidence as to the debtor's insolvency is admissible.[59] So, in the same State, in an action against the sheriff for the escape of the debtor from the liberties of the jail, he having taken insufficient security, the rule of damages is the amount of the debt.[60] So, in Connecticut, in the sheriff's action for an escape on the security taken by him for the jail liberties, the rule is the debt and costs on the execution with

[56] Moore *v.* Moore, 25 Beav. 8.

[57] Macrae *v.* Clarke, L. R. 1 C. P. 403.

[57a] *Connecticut:* Bowen *v.* Huntington, 3 Conn. 423.

Maryland: State *v.* Lawson, 4 Gill, 62.

Massachusetts: Whitehead *v.* Varnum, 14 Pick. 523.

New York: Barnes *v.* Willett, 35 Barb. 514; Renick *v.* Orser, 4 Bosw. 384; McCreery *v.* Willett, 4 Bosw. 643, 9 Bosw. 600. See, however, Kellogg *v.* Manro, 9 Johns. 300; Rawson *v.* Dole, 2 Johns. 454.

[58] Dunford *v.* Weaver, 84 N. Y. 445.

[59] Goodrich *v.* Starr, 18 Vt. 222.

[60] Wheeler *v.* Pettes, 21 Vt. 398. See, in the same State, Vilas *v.* Barker, 20 Vt. 603, an action against a sheriff for refusing to assign a jail bond to the creditor.

interest.[61] So it is held that if the marshal fail to bring in the body of the defendant on the return of the writ, he will be amerced in the full amount of the debt or damages and costs.[62]

So, in North Carolina, where the remedy of debt is given by statute against the sheriff who shall wilfully or negligently suffer a debtor charged in execution to escape; it has been held that the sheriff is fixed with the debt.[63] Later cases, however, appear to have established the English rule in this country; and it is now generally agreed that the true measure of damages is the value of the custody at the moment of the escape. That value must depend on the circumstances of each case.[64] So in Georgia, in an action of debt upon the sheriff's official bond for an escape on mesne process, it has been held that the insolvency of the original debtor may be given in evidence by the defendant in mitigation of damages.[65] In Massachusetts, it was said in an early case that in actions of this kind, "It is peculiarly the right of the jury to assess the damages, and in this they are not restricted to any precise sum." [66] And so again, "that the jury have the subject of damages at their discretion." [67] But notwithstanding this general language, the rule was settled that the amount of the plaintiff's debt is, *prima facie*, the measure of damages; [68] that it was competent for the defendant to show, in mitigation of damages, any circumstances which go to prove that the plaintiff has, in truth, not suffered any actual injury from the loss complained of,[69] and that, on the other hand, it was competent, if the wrong be a wilful one, for the jury to give more than the actual loss.[70] But

[61] Seymour *v.* Harvey, 8 Conn. 63.

[62] Winter *v.* Simonton, 2 D. C. (2 Cr. C. C.) 585.

[63] Adams *v.* Turrentine, 8 Ired. 147.

[64] *Connecticut:* Swan *v.* Bridgeport, 70 Conn. 143, 39 Atl. 110.

Indiana: State *v.* Caldwell, 115 Ind. 6, 17 N. E. 185.

Pennsylvania: Shuler *v.* Garrison, 5 W. & S. 455.

[65] Crawford *v.* Andrews, 6 Ga. 244.

[66] Weld *v.* Bartlett, 10 Mass. 470, and Colby *v.* Sampson, 5 Mass. 310.

[67] Rich *v.* Bell, 16 Mass. 294. See, also, Burrell *v.* Lithgow, 2 Mass. 526.

[68] Young *v.* Hosmer, 11 Mass. 89; Porter *v.* Sayward, 7 Mass. 377, 5 Am. Dec. 50.

[69] Brooks *v.* Hoyt, 6 Pick. 468; Shakford *v.* Goodwin, 13 Mass. 187; Nye *v.* Smith, 11 Mass. 188.

[70] Weld *v.* Bartlett, 10 Mass. 470. Though in this case it was intimated that the limit of the discretion of the jury, even in case of wilful wrong, is merely "expenses and costs not taxable." See, also, Selfridge *v.* Lithgow, 2 Mass. 374.

in Chase *v.* Keyes,[71] an action on the case founded upon the statute giving the plaintiff "such damages as he shall have suffered," it was held that the plaintiff must prove his loss, and the measure of damages was not even *prima facie* the amount of the debt.

In accordance with this doctrine now well established, if a party is in custody on process for contempt, and is to be held in custody only till he pay a pecuniary fine, and is utterly insolvent, the damages must be merely nominal. If he is ordered to stand committed till he perform a specified act which he has the power to perform, the value of the custody must depend on the nature of the act, and the consequences to the aggrieved party of a failure to secure its performance.[72] In the case of Jenkins *v.* Troutman,[73] the court, while again recognizing the rule of mitigation already acquiesced in, in that State,[74] by allowing the defendant to show that the effect of his wrongful act was not so great because the escaped debtor could not pay the debt, or any part of it, rejected as irrelevant, proof that the defendant was "largely indebted," which was offered with a view to establish the probability that the debtor would, if arrested, have assigned his property to secure the payment of those debts, thereby diminishing the plaintiff's chances of satisfaction. So, in the case of Sherrill *v.* Shuford,[75] the court say: "The true inquiry is, has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might by due process have been subject to it, he shall answer to the full amount of the debt." Where, however, a defendant is arrested by the sheriff, and gives bail, and is discharged, but the bail do not justify, the sheriff becomes bail, and is liable to the same extent to which the bail would have been had they justified. In such case, therefore, after the return of the execution unsatisfied, the sheriff is liable for the judgment and interest, and the insolvency of the judgment debtor will not go in mitigation of the damages.[76] In an action against a former

[71] 2 Gray, 214.

[72] Hootman *v.* Shriner, 15 Oh. St. 43.

[73] 7 Jones, L. 169.

[74] Murphy *v.* Troutman, 5 Jones, L. 379.

[75] 10 Ired. 200.

[76] Metcalf *v.* Stryker, 31 N. Y. 255; Bensel *v.* Lynch, 44 N. Y. 162.

sheriff, as for an escape, on the ground of his neglect to assign over at the end of his term to his successor in office a debtor taken in execution, who is on the jail limits, the plaintiff's omission to cause the prisoner to be retaken, by issuing a new execution, may be considered in mitigation of the damages.[77] Where after an escape the sheriff rearrests the judgment debtor and holds him on the old execution, the plaintiff can recover only such expenses as the escape caused him.[78]

§ 554a. Escape from arrest on mesne process.

Whatever be the rule adopted in case of escape from arrest on execution, where the arrest was upon mesne process the actual damages must be proved, and the amount of a judgment subsequently recovered or of the damages named in the writ is at most only a *prima facie* measure of damages. Even in New York, where the liability for escape on execution is most stringent, the actual damages only can be recovered where the arrest was on mesne process;[79] and the same rule prevails elsewhere. So, in Arkansas, it has been held, that in actions for escape from mesne process, the presumption is that the plaintiff lost the entire debt by the escape; and the measure of damages against the officer is the amount of the original debt; but the defendant is at liberty to prove in mitigation of damages that the debt could not have been made out of the debtor,[80] and the same is the rule in Maryland.[81] So, in North Carolina, in debt, on a sheriff's bond for an escape, where the sheriff's return was, "The defendant arrested; signed the appearance bond; refused to give surety; and made his escape by jumping on his horse and running, there being no one present to assist," the measure of damages was recently held to be, not the debt and interest, but such actual damages as the plaintiff had sustained.[82] It follows from this general rule that the plaintiff in order to recover must show the validity of the debt;[83]

[77] French *v.* Willet, 10 Bosw. 566.

[78] State *v.* Newcomer, 109 Ind. 243; State *v.* Caldwell, 115 Ind. 6.

[79] Potter *v.* Lansing, 1 Johns. 215, 3 Am. Dec. 310; Patterson *v.* Westervelt, 17 Wend. 543; Russell *v.* Turner, 7 Johns. 189, 5 Am. Dec. 254; Latham *v.* Westervelt, 26 Barb. 256.

[80] Faulkner *v.* Bartley, 6 Ark. 150.

[81] State *v.* Baden, 11 Md. 317.

[82] State *v.* Falls, 63 N. C. 188.

[83] Lewis *v.* Morland, 2 B. & Ald. 56; Scott *v.* Henley, 1 M. & Rob. 227.

and if it was outlawed he can recover only nominal damages.[84]

§ 555. Insufficient bail or surety.

In an action on the case, brought against a sheriff for not taking sufficient bail, the principal debtor being sued to judgment and the execution returned unsatisfied, this language was held: "Although the amount of the judgment is *prima facie* evidence of the measure of damages, yet this may be controlled by evidence showing the entire inability of the debtor to pay, and the actual injury therefrom to be less than the amount of the judgment against him." And although the principal debtors had left the State, and could not be found on the execution, evidence as to their poverty was held admissible, the court saying: "The fact that the principal debtors were out of the commonwealth, and could not be arrested on execution, may be important in its bearing upon the amount of damages sustained by the default of the sheriff, but it does not affect the general rule of damages, or the competency of evidence tending to show the entire inability of the debtor to satisfy the demand. In all actions on the case, the question is, what is the amount of damages sustained?" [85] So in an action on the case against the sheriff, for taking insufficient bail, it is competent for the defendant to prove, in mitigation of damages, the inability of the original debtor to pay the judgment which has been obtained against him in the suit upon which he was arrested. The true measure of damages is the injury actually sustained by the judgment creditor; and, therefore, evidence tending to show that the debtor was poor or insolvent, so that his arrest on execution would not have enabled the creditor to realize his debt, also tends to prove that the plaintiff suffered no essential injury by the negligence of the officer.[86] It is a general principle that, in an action against a sheriff for taking insufficient sureties, no more can be recovered against him than the party

[84] Slocum *v.* Riley, 145 Mass. 370, 14 N. E. 174.

[85] West *v.* Rice, 9 Met. (Mass.) 564.

[86] Danforth *v.* Pratt, 9 Cush. (Mass.) 318. *Contra,* Gerrish *v.* Edson, 1 N. H. 82; Jones *v.* Blair, 4 McCord (S.C.) 281. The measure of damages is the full amount of the debt where there is no evidence of the debtor's insolvency. Crane *v.* Warner, 14 Vt. 40, 39 Am. Dec. 205.

could have recovered against sufficient sureties.[87] And in an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage, beyond the limits of the bond, the expenses of a fruitless action against the pledgees, unless he gave the sheriff notice of his intention to sue them.[88]

Where the sheriff took an informal replevin bond, and the defendant in replevin had judgment for a return, the measure of his damages in an action against the sheriff is the value of the goods at the time of taking, with interest;[89] and he may also recover the costs and expenses of the replevin suit, and of a fruitless action on the bond; but his recovery is limited to the penalty of the bond.[90] But if the goods were the property of the plaintiff in replevin, and the defendant in replevin had no right to a return, he can recover only nominal damages from the sheriff.[91]

§ 556. Failure to return.

For failure to return an execution, the measure of damages is the actual loss sustained,[92] which is *prima facie* the amount of the execution.[93]

In an action brought against a sheriff for neglecting to return a *fi. fa.*, an omission of duty for which the Revised Statutes of

[87] *Massachusetts:* Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486.

Missouri: Mortland *v.* Smith, 32 Mo. 225, 82 Am. Dec. 128.

England: Yea *v.* Lethbridge, 4 T. R. 433; Evans *v.* Brander, 2 H. Bl. 547. By this case, Concanen *v.* Lethbridge, 2 H. Bl. 36, was overruled. See, also, Jeffery *v.* Bastard, 4 A. & E. 823.

[88] Baker *v.* Garratt, 3 Bing. 56. See Gibbs *v.* Bull, 20 Johns. 212, a suit for taking insufficient pledges in replevin.

[89] O'Grady *v.* Keyes, 1 All. (Mass.) 284.

[90] Norman *v.* Hope, 13 Ont. 556, 14 Ont. 287.

[91] Case *v.* Babbitt, 16 Gray (Mass.), 278.

[92] *Kentucky:* Williams *v.* Hall, 2 Dana, 97; Shippen *v.* Curry, 3 Met. 184; Hill *v.* Turner, 3 Bush, 27, 96 Am. Dec. 192, *n.* See O'Bannon *v.* Huffman, 1 B. Mon. 212.

Maine: Ware *v.* Fowler, 14 Me. 183.

Massachusetts: Waterhouse *v.* Waite, 11 Mass. 207.

New Hampshire: Grafton Bank *v.* White, 17 N. H. 389.

Texas: Hamilton *v.* Ward, 4 Tex. 356.

Vermont: Woolcott *v.* Gray, Brayt. 91; Hamilton *v.* Marsh, 2 Tyler, 403.

Contra, Alabama: Reid *v.* Dunklin, 5 Ala. 205.

Mississippi: Helm *v.* Gridley, Walk. 511.

[93] *Michigan:* Dunphy *v.* Whipple, 25 Mich. 10.

New York: Smith *v.* Geraty, 112 N. Y. Supp. 1100, 61 Misc. 101.

Texas: Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295.

New York declared that the officer shall be liable for *the damages sustained* by any party aggrieved, the measure of damages was held to be the amount of the execution, subject, however, to mitigation upon showing that the whole or any part of it could not be collected.[94] For refusal to hand over a bail bond, the measure of damages is the amount the bail must pay, which might be reduced by proof of the insolvency of the bail,[95] but not of the debtor.[96] For failure to return an order of sale of mortgaged property, the measure of damages is the actual value of the property.[97] For failure to hand over to the plaintiff in replevin the goods replevied, the measure of damages would ordinarily be the value of the goods; but the defendant may show that the plaintiff was not in fact entitled to the goods.[98] For failure to produce either attached property or the receipt he had taken for it, the sheriff is holder for the value of the property as returned in the writ.[99]

§ 557. False return.

For a false return of *nulla bona*, the measure of damages is the value of the property which the plaintiff would have been enabled to apply in satisfaction of the execution.[100] Where there is property enough to satisfy the amount directed to be collected on the execution, that amount, with interest, is the measure. The sheriff may show, in mitigation, that there was not property enough to satisfy the demand, or that it would have been absorbed by prior executions, but not that the amount directed to be levied was not due on the judgment.[101] In Ireland, for a false return of *non est inventus*, the analogy of escapes was followed, and the value of the custody was said to be the rule.[102] And in Beckford *v.* Montague,[103] case for a false

[94] Ledyard *v.* Jones, 7 N. Y. 550, modifying or confirming the earlier cases; Hinman *v.* Borden, 10 Wend. 367, 25 Am. Dec. 568; Stevens *v.* Rowe, 3 Den. 327; Persons *v.* Parker, 3 Barb. 249; Dolson *v.* Saxton, 11 Hun, 565.

[95] Bradt *v.* Holden, 12 R. I. 335.

[96] Seeley *v.* Brown, 14 Pick. 177; Bradt *v.* Holden, 12 R. I. 335.

[97] Boyd *v.* Desmond, 79 Cal. 250.

[98] Robinson *v.* Shirreff, 25 N. B. 68.

[99] Allen *v.* Doyle, 33 Me. 420.

[100] *Maine:* Thayer *v.* Roberts, 44 Me. 247.

England: Mullett *v.* Challis, 16 Q. B. 239, 2 Eng. L. & Eq. 260.

[101] *New York:* Bacon *v.* Cropsey, 7 N. Y. 195.

Pennsylaania: Forsyth *v.* Dickson, 1 Grant, 26.

[102] Cahill *v.* Verner, 2 Ir. C. L. 549.

[103] 2 Esp. 475; see also White *v.* Jones, 5 Esp. 160.

return of mesne process, the original defendant being still within the reach of process, Lord Kenyon told the jury that they were not called on to give the plaintiff the whole extent of the debt, if the original debtor was still solvent. In Massachusetts, where a sheriff returned to the original writ that he had taken bail, and then refused to deliver the bail-bond, the fact being that no bail had been taken, he was not permitted to show in mitigation that the original defendant was insolvent.[104] Pelham *v.* Way [105] was an action against a United States marshal for a false return, in returning that he had taken a note. In fact he had not taken the note, but had sold the debt of which the note was evidence. It was held that the plaintiff could only recover nominal damages, for the sale of the debt had not injured him, as it did not extinguish the note or the debt, for the libel under which the return was made was not against the debt. Where suit is brought against a sheriff for a false return of *nulla bona* to an execution, it seems that an inquisition finding the property out of the original defendant is a bar to the action; but in a suit against the officer in trespass by the true owner, an inquisition finding the other way is only to be received in mitigation.[106]

§ 558. Miscellaneous breaches of duty.

It is held in Indiana, that, on a sale of land in execution, the sheriff is bound to tender a deed to the purchaser; and where, without doing so, he resells for omission of the purchaser to pay the purchase-money, the sheriff is himself liable to the execution defendant for the amount of the difference between the two sales.[107] Where a sheriff, without the direction of the creditors, made sales of property on credit, on some of which sales he received interest before the return day of the executions, and on others, the purchasers proved insolvent, he was

[104] Simmons *v.* Bradford, 15 Mass. 82. In Indiana, by statute, in case of a false return to a writ of *fieri facias*, the constable and his sureties are liable on the bond for the full amount which the officer might have collected and paid over, with interest and ten per cent damages. R. S. 1881, § 784; Limpus *v.* The State, 7 Blackf. 43.

[105] 15 Wall. 196, 21 L. ed. 55.

[106] *New York:* Bayley *v.* Bates, 8 Johns. 185; Townsend *v.* Phillips, 10 Johns. 98.

England: Farr *v.* Newman, 4 T. R. 621, 633, 648; Roberts *v.* Thomas, 6 T. R. 88; Wells *v.* Pickman, 7 T. R. 174, 177.

[107] State *v.* Lines, 4 Ind. 351.

held bound to account to the creditors, on the executions, to the full amount of the sales, but not for the interest.[108] And where the sheriff having levied on sufficient property, it is wrongfully replevied, and he without excuse neglects to prosecute the sureties in the replevin bond, he will not be allowed his expenses in the replevin suit, though they are within the terms of the bond to indemnify him.[109] In an action against a sheriff, by the surety of a defendant in an elder execution, for applying the proceeds of such defendant's property upon a junior execution, whereby such surety's property was taken upon the elder, the officer is only liable for so much of the surety's property as sold for the sum so misapplied.[110]

§ 559. Magistrate.

Where a judicial officer is acting ministerially, he is liable for the damage directly resulting from his negligence. In such case, the rules of liability and mitigation are the same with those applicable to ministerial officers. And a magistrate liable for the damages directly resulting from his negligence in issuing an irregular or invalid execution, may, in an action brought for the recovery of such damage, show that the judgment debtor had no property, and that the debt could not have been collected on a valid execution.[111] And the same decision was reached in an action against a justice of the peace for neglecting to issue an execution.[112] In California, where, because of a defect in a notary's certificate of acknowledgment to a mortgage, it was held not to import notice to subsequent incumbrancers, and the lien of the plaintiff's mortgage was in consequence postponed to that of a later one, and his debt thereby lost, in an action by the mortgagee against the notary on his official bond, the plaintiff was held entitled to recover the mortgage debt and interest.[113]

[108] Chase *v.* Monroe, 30 N. H. 427.

[109] Swezey *v.* Lott, 21 N. Y. 481, 78 Am. Dec. 160.

In an action against a sheriff for unauthorized release of the attached property, he may show that prior attachments were sufficient to exhaust the property. Lowenberg *v.* Jeffries, 74 Fed. 385.

[110] Staton *v.* Com., 2 Dana (Ky.), 397.

[111] Noxon *v.* Hill, 2 All. (Mass.) 215.

[112] Carpenter *v.* Warner, 38 Oh. St. 416; Gaylor *v.* Hunt, 23 Oh. St. 255.

[113] Fogarty *v.* Finlay, 10 Cal. 239. It should be mentioned that by statute the notary was liable on his official bond to parties injured by his official misconduct for "all damages sustained."

§ 559a. Clerk of court.

In Baltimore and Ohio Railroad *v.* Weedon [114] the action was against a clerk of court for failure to issue process to review a judgment against plaintiff. The measure of damages was held to be the amount of the judgment unless the officer could reduce it as by showing that the plaintiff must have been defeated in any case. In an action against prothonotary for negligence in issuing a writ, where he failed to inspect the record of plaintiff's judgment and the writ issued did not conform to it in every particular, in consequence of which part of the claim was lost, the measure of damages is the amount of the claim thus lost.[115]

§ 559b. Receiver.

Where a receiver takes goods wrongfully, but in *bona fide* exercise of the power conferred upon him by the court, he is not liable for damages to the owner, whose remedy lies in an application to the court.[116] If the applicant for the appointment of a receiver gave a bond, action will lie upon the bond for the entire damages caused by the receiver and chargeable to such applicant.[117]

§ 560. County clerk.

In an action in New York against a county clerk, who, by statute in that State (Laws 1853, ch. 142), was made liable for all damages for mistakes in searches made by him in his office, it appeared that in a search made by him at the request of an attorney who had been employed to examine the title to a house and lot belonging to the plaintiff's intestate, and paid by the plaintiff, a judgment of about twenty-seven dollars, which was a lien on the premises, had been omitted. The examination of the title was made for the purpose of procuring a loan by mortgage on the property. The money was obtained and applied, as far as necessary, to the satisfaction of such liens as were returned on the search. It was more than enough to satisfy them

[114] 78 Fed. 584, 47 U. S. App. 360, 24 C. C. A. 249. See Cohen *v.* Marchant, 1 Disney (Ohio), 113.

[115] Wilson *v.* Arnold, 172 Pa. 264, 33 Atl. 552.

[116] Tapscott *v.* Lyon, 103 Cal. 297, 37 Pac. 225.

[117] Haverly *v.* Elliott, 39 Neb. 201, 57 N. W. 1010.

and also the omitted judgment. The premises, which were worth $6,000, were afterwards sold on an execution on that judgment, and were bought in by the plaintiff in the execution for $60. By a compromise arrangement, in consideration of $400, he conveyed the premises to the plaintiff as executor and trustee of the deceased owner. In a judgment, which was affirmed by the Court of Appeals, the county clerk was held not responsible for the loss sustained, as it was directly caused by the non-payment of the judgment, and not by his omission.[118]

§ 561. Treasurer.

In McHaney *v.* Trustees,[119] it appeared that a note with two sureties came into the hands of the defendant as county treasurer. The principal died. In an action on his official bond for his failure to present the note for payment against the estate, it was held that, as there was no evidence to show that, if it had been presented, it would have been paid, or that the sureties were insolvent, only nominal damages could be recovered.

§ 562. Town officers.

In an action against the supervisors of a town for refusing to place on the tax list two judgments recovered against the town, evidence was admitted to show that, subsequently to the commencement of this action, one of the judgments had been placed on the tax list, and it was held that, such being the case, the defendants were not liable for the whole amount of the plaintiff's judgments. It was also said that, such being the case, it was proper to instruct the jury that the plaintiff could only recover nominal damages where he failed to show any special injury, Clifford, J., dissenting, and holding that the plaintiff was entitled to recover the actual damage sustained in view of the whole evidence.[120] In such an action a plaintiff can recover the expenses incurred in the employment of counsel.[121] In an action against the supervisor of a town for refusing to present to the board of supervisors of the county a reassessment of damages in the plaintiff's favor, the plaintiff can

[118] Kimball *v.* Connolly, 3 Keyes (N. Y.), 57, 2 Abb. App. 504.

[119] 68 Ill. 140.

[120] Dow *v.* Humbert, 91 U. S. 294, 23 L. ed. 368.

[121] Newark Savings Inst. *v.* Panhorst, 7 Biss. 99.

recover the amount of the reassessment, with interest, and he can recover the full interest, although he might have gone before another board and thus reduced the damage, the court saying, that he was not obliged to go before another board.[122]

In an action against a collector of taxes for a wrongful sale of the property for taxes, the amount recovered by the amount of the tax validly paid from the proceeds of the sale,[123] and if the plaintiff bid in the goods, his recovery is restricted to the amount he paid for them.[124] So, where it was made the duty of a town by statute to make good to a purchaser of land at a tax sale all damages by reason of the collector's neglect, in an action for such neglect, the measure was held to be, not the value of the land, but the amount paid and interest.[125] Where selectmen wrongfully but in good faith refused to allow plaintiff to vote, exemplary damages were refused.[126] Where a town clerk inadvertently gave a defendant a false certificate, attested as a copy of record, in order to support his plea of infancy, by reason of which the plaintiff was obliged to obtain a continuance of his cause to the next term, prior to which the debtor died,—it was holden that the town clerk was liable to pay the plaintiff the damages occasioned by the delay and continuance of the action.[127]

§ 563. Collector of customs.

In an action against a collector of customs, for refusing to sign a bill of entry for landing a cargo of foreign wheat, in consequence of which the plaintiff was obliged to pay duty on it when, in fact, no duty was by law payable, the proper measure of damages has been held, by the King's Bench in England, to be, not merely the amount of duties paid, but the amount of loss sustained by the plaintiff in consequence of a subsequent fall in the price of the article.[128]

In an action by the United States against a collector on his official bond, for not returning paid treasury notes to the proper department at Washington, it has been held that the rule of

[122] Clark *v.* Miller, 54 N. Y. 528.

[123] Maul *v.* Drexel, 55 Neb. 446, 76 N. W. 163.

[124] Hurlburt *v.* Green, 41 Vt. 490.

[125] Saulters *v.* Victory, 35 Vt. 351.

[126] Pierce *v.* Getchell, 76 Me. 216.

[127] Maxwell *v.* Pike, 2 Me. 8.

[128] Barrow *v.* Arnaud, 8 Q. B. 595, 10 Jur. 319.

damages would be the amount of the notes, unless it was shown that they were cancelled, and that the United States had suffered, or was likely to suffer, less than their amount; and that the jury were to take into consideration the amount of damage, from the risk of the notes getting into circulation again; from the delay and inconvenience in obtaining vouchers to settle the accounts; and from the want of evidence at the department that the notes had been redeemed.[129] Where trespass was brought against the collector of customs for New York [130] for illegally seizing the plaintiff's vessel, it appeared that she was seized on the 2d of October, 1801, and retained in custody till the 25th August, 1802, when she was restored. Six months before the seizure, the plaintiff had purchased her for $12,474; and the day previous to the trespass, he made a contract to sell her for $9,500. On the 2d September, 1802, eight days after her restoration, she was finally sold at public sale for $4,288; the plaintiff claimed the sum of $9,500 (the contract price), with interest and marshal's fees deducting the price actually obtained at the sale, $4,288; and this was held right by the Supreme Court of New York. This recognizes the principle that where an actual bargain is interfered with by the defendant's tortious act, he shall be made responsible for the loss sustained. It is not a case of mere contingent damages or speculative profits; it is an actual contract broken up by an unauthorized act.

§ 563a. Notary.

In an action against a notary, for failing to give notice of the dishonor of paper, according to his undertaking, the measure of damages must be the injury sustained by the neglect; in estimating which, the solvency of the party to whom notice should have been given, is a material element.[131] And where a notary falsely certified the acknowledgment of a mortgage, the measure of damages is the value of the security that would have been given by the mortgage, considering the value of the property and the amount of prior liens on it, not exceeding the amount of the mortgage debt.[132]

[129] U. S. *v.* Morgan, 11 How. 154, 13 L. ed. 643.

[130] Woodham *v.* Gelston, 1 Johns. (N. Y.) 134.

[131] Bank of Mobile *v.* Marston, 7 Ala. 108.

[132] Mahoney *v.* Dixon, 31 Mont. 107, 77 Pac. 519.

§ 563b. Other officers.

Where a letter was sent by the managers of a lottery to a vendor of tickets, enclosing a prize list, or statement of the drawing, which the postmaster unlawfully refused to deliver to such vendor, but delivered it to another, who, availing himself of the information it contained, purchased of such vendor a ticket which had drawn a prize,—the injury was holden to be the immediate consequence of such unlawful withholding of the letter, and consequently the true measure of damages would be the net amount of the prize.[133] And where a military officer wrongfully seized liquor supposed to be in the Indian country when in fact it was not, the measure of damages was the difference in value of the property at the time and place where it was seized and at the time and place where it was returned to the plaintiff.[134]

§ 564. Trespass by officer.

* We have been examining cases where the public officer is charged with neglect in not executing process confided to him. There is another large class of cases, where the complaint is that he has overstepped his powers, and abused the process of the court. In these cases we shall find, that where the acts of public officers are illegal, they are very narrowly watched, and often, by the infliction of vindictive damages, severely punished for the abuse of their trust; so, where trespass was brought for breaking and entering the plaintiff's house, and taking his goods, it appearing that judgment had been obtained in a court of local jurisdiction, and that execution was illegally levied on property of the plaintiff *out* of the jurisdiction, it was held that the plaintiff was entitled to recover the amount paid by him to release the levy. It was insisted that, as the plaintiff clearly owed the debt, this rule could not apply. But Lord Denman, C. J., said: "A person who takes upon himself to extort money by an authority which he does not possess, must repay the money which he raises thereby." And Patterson, J., said: "I am afraid of admitting the principle contended for, that where money has been extorted by means of an illegal authority,

[133] Bishop *v.* Williamson, 11 Me. 495.

[134] Bates *v.* Clark, 95 U. S. 204, 24 L. ed. 471.

the measure of damages is to be merely the amount of injury actually sustained." [135] ** Where the sheriff unlawfully and maliciously executed a search warrant, it was held that the plaintiff might recover for his sense of humiliation.[136]

* So, in a case, where the defendants, under color of process, illegally broke into the plaintiff's house to levy an execution, and the plaintiff paid the amount due on the writ, under protest, to induce the defendants to withdraw, the jury gave the amount so paid and £500 besides, as damages; a motion was made to reduce the damages; but the court said: "The trespasses were of a very serious nature, having been committed by officers of the law, under color of the law, breaking open the outer door with great violence. Such conduct is calculated to lead to dangerous conflicts; and the proper amount of damages must depend so much on the general circumstances, that it is very difficult to discover any standard by which to measure the amount; much must be left to the discretion of the jury." [137] So, in an action of trespass *de bonis asportatis*, for an illegal levy, it was held, "that the jury might give vindictive damages, if they should find that the trespass was committed maliciously, and in a wanton and aggravated manner, and with a design to vex and injure the plaintiff." [138] **

But exemplary damages can, of course, only be given for aggravated trespass; where there are no circumstances of aggravation compensatory damages only can be given.[139] And in such a case no damages can be recovered for mental anguish and humiliation.[140]

[135] Sowell *v.* Champion, 2 Nev. & P. 627, 6 A. & E. 407; *acc.*, Von Storch *v.* Winslow, 13 R. I. 23, 43 Am. Rep. 10.

[136] Melcher *v.* Scruggs, 72 Mo. 406.

[137] Duke of Brunswick *v.* Slowman, 8 C. B. 317.

[138] *Connecticut:* Huntley *v.* Bacon, 15 Conn. 267, 273.

Missouri: Central C. & L. Co. *v.* Welborn, 134 S. W. 2.

Texas: Rodgers *v.* Ferguson, 32 Tex. 533, 36 Tex. 544, 14 Am. Rep. 380; Railey *v.* Hopkins (Tex. Civ. App.), 131 S. W. 624.

[139] *California:* Van Pelt *v.* Littler, 14 Cal. 194; Spooner *v.* Cady 44 Pac. 1018.

Louisiana: Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77.

Nebraska: Murray *v.* Mace, 41 Neb. 60, 59 N. W. 387.

New Hampshire: Moore *v.* Bowman, 47 N. H. 494.

Pennsylvania: Rose *v.* Story, 1 Pa. 190, 44 Am. Dec. 121.

Utah: Marks *v.* Culmer, 6 Utah, 419, 24 Pac. 528.

[140] *Iowa:* Tisdale *v.* Major, 106 Ia. 1, 75 N. W. 663, 68 Am. St. Rep. 263.

Nothing can be recovered for the expense of defending the attachment suit.[141]

§ 565. Wrongful attachment or levy of execution.

In an action for the illegal seizure of goods, if there be no circumstances of aggravation, the measure of damages is the value of the goods, with interest from the time of the taking to that of the trial.[142] So in Vermont, in an action brought against an officer who had attached the plaintiff's goods, it has been said: "That no case can be found where damages have been given for trespass to *personal property*, when no unlawful intent or disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved." [143] So, in an action on the sheriff's official bond, for the conversion of notes taken by him for property sold on partition, the measure is the value of the notes.[144] This value cannot be reduced

Nebraska: Murray *v.* Mace, 41 Neb. 60, 59 N. W. 387.

New Hampshire: Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

North Carolina: Chappell *v.* Ellis, 123 N. C. 259, 31 S. E. 709.

Texas: Trawick *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. 564; Morris *v.* Wilford (Tex. Civ. App.), 70 S. W. 228; Ainsa *v.* Moses (Tex. Civ. App.), 100 S. W. 791.

Washington: Fish *v.* Nethercutt, 14 Wash. 582, 45 Pac. 44; McGill *v.* W. P. Fuller & Co., 45 Wash. 615, 88 Pac. 1038.

[141] Central C. & L. Co. *v.* Welborn, 134 S. W. 2. By statute in some jurisdictions such expense may be recovered from the plaintiff in the attachment suit. Talbott *v.* Great W. P. Co., 151 Mo. App. 538, 132 S. W. 15.

[142] *Alabama:* Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

Arkansas: Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186; Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

Colorado: Brasher *v.* Holtz, 12 Colo. 201; Cornforth *v.* Maguire, 12 Colo. 432.

Kansas: Dow *v.* Julien, 32 Kan. 576.

Maine: Smith *v.* Putney, 18 Me. 87.

Maryland: Wanamaker *v.* Bowes, 36 Md. 42.

Massachusetts: Mitchell *v.* Stetson, 7 Cush. 435.

Missouri: Walker *v.* Borland, 21 Mo. 289.

New York: Parker *v.* Conner, 44 N. Y. Super. Ct. 416.

Tennessee: Reeves *v.* John, 43 S. W. 134.

Texas: Erwin *v.* Bowman, 51 Tex. 513, 32 Am. Rep. 632; Willis *v.* Whitsitt, 67 Tex. 673; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. 478; Richardson *v.* Jankofsky, 23 S. W. 815; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Morris *v.* Williford (Tex. Civ. App.), 70 S. W. 228; Avindino *v.* Beck (Tex. Civ. App.), 73 S. W. 539; Railey *v.* Hopkins (Tex. Civ. App.), 131 S. W. 624.

Virginia: Crawford *v.* Jarrett, 2 Leigh, 630.

Wisconsin: Stanley *v.* Carey, 89 Wis. 410, 62 N. W. 188.

[143] Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

[144] Brobst *v.* Skillen, 16 Oh. St. 382, 88 Am. Dec. 456.

by showing that plaintiff bought the goods at a nominal price,[145] or that he had contemplated selling them at a low price,[146] nor can the plaintiff be limited to the price for which the officer sold the goods,[147] or to the invoice value.[148] But where plaintiff had sold the goods before the attachment, he could recover the price at which he had sold them.[149]

Where goods are illegally seized by the sheriff *in transitu*, the measure of damages is analogous to that in the case of a carrier failing to deliver, and is said to be their value at the place of destination, deducting the necessary expenses of transportation thither.[150] And where a sheriff, under color of an attachment, had seized the plaintiff's books of account and returned them as attached in a suit against another person, in consequence of which they were delivered to that person's receiver, who collected the accounts, the measure of damages was held to be the amount collected, with interest from the time of the collection.[151] Interest on the value of the property taken by the sheriff, from the time it was taken until its restitution, may be recovered; [152] and where there is no restitution, in accordance with the American doctrine as to interest, it should be added to the amount of the debt or the value of the property.[153]

A mortgagee or pledgee of personal property recovers the value of the goods taken, with interest, up to the amount of the mortgage or pledge.[154] In trespass brought by the assignee

[145] Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342. But see Forsyth *v.* Palmer, 14 Pa. 96, 53 Am. Dec. 519.

[146] Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267.

[147] *Idaho:* Cowden *v.* Finney, 9 Ida. 619, 75 Pac. 765.

Pennsylvania: Rogers *v.* Fales, 5 Pa. 154.

[148] Reeves *v.* John (Tenn. Ch.), 43 S. W. 134.

[149] Curry *v.* Catlin, 12 Wash. 332, 41 Pac. 55.

[150] Eby *v.* Schumacher, 29 Pa. 40.

[151] Woodborne *v.* Scarborough, 20 Oh. St. 57.

[152] Beveridge *v.* Welch, 7 Wis. 465. So where money is garnished wrongfully, interest may be recovered as damages. Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90. And where shares of stock were wrongfully attached, and dividends declared during the period of attachment were held up by the attachment, interest on the dividends was allowed. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395.

[153] Hessing *v.* McClosky, 37 Ill. 341.

[154] *California:* Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601.

Indiana: Slifer *v.* State, 114 Ind. 291; Collins *v.* Hutchinson, 3 Ind. App. 542, 30 N. E. 12.

Iowa: Crawford *v.* Nolan, 72 Ia. 763, 34 N. W. 754, 2 Am. St. Rep. 263.

Minnesota: Becker *v.* Dunham, 27 Minn. 32, 6 N. W. 406.

of a mortgage of personal property, against an officer for taking the property on an execution against the mortgagor, and holding it till the assignee paid the execution and officer's fees, the measure of damages is the amount paid and interest, besides a reasonable compensation for the taking and detention.[155]

The mortgagor may recover for the wrongful attachment, but his damages for detention of the goods cannot be allowed after a foreclosure of the mortgage,[156] and the proceeds of the goods which were applied on the mortgage debt are to be deducted.[157]

§ 565a. Recovery of the goods or their proceeds.

Where the goods are returned, this fact can be shown in reduction of damages;[158] and in such case the measure of damages is their deterioration in value,[159] and the expense of bidding it in at the sale, repurchasing it, or otherwise securing a re-

Vermont: Chaffer *v.* Sherman, 26 Vt. 237.

But it is sometimes said that the sheriff is a stranger to the mortgagor's rights and cannot take advantage of them; and therefore that a mortgagee in possession at the time of the illegal attachment may recover the full value from the sheriff.

California: Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95 (pledgee).

Michigan: Densmore *v.* Mathews, 58 Mich. 616, 26 N. W. 146.

[155] *Dakota:* Lander *v.* Propper, 6 Dak. 64, 50 N. W. 400.

New Hampshire: Carpenter *v.* Cummings, 40 N. H. 158.

[156] *Kentucky:* Gaar *v.* Lyons, 99 Ky. 672, 37 S. W. 73, 148.

Texas: Koyer *v.* White, 6 Tex. Civ. App. 381, 25 S. W. 46 (unless the wrongful attachment caused the foreclosure).

[157] Cooper *v.* Newman, 45 N. H. 339.

[158] *Arkansas:* Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740.

North Carolina: Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170.

Pennsylvania: Graham *v.* McCreary, 40 Pa. 515.

Texas: Seal *v.* Holcomb (Tex. Civ. App.), 107 S. W. 916.

See Davis *v.* Gott, 130 Ky. 486, 113 S. W. 826.

The officer cannot insist on returning the goods to reduce the damages. Carpenter *v.* Dresser, 72 Me. 377, 39 Am. Rep. 337.

[159] *Arkansas:* Patton *v.* Garrett, 37 Ark. 605; Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267.

District of Columbia: Palmer *v.* Augenstein, 18 D. C. App. Cas. 511.

Georgia: Holton *v.* Taylor, 80 Ga. 508.

Illinois: MacVeagh *v.* Bailey, 29 Ill. App. 606; Smith *v.* Miller, 145 Ill. App. 606.

Iowa: Lowenstein *v.* Monroe, 55 Ia. 82; Chesmore *v.* Barker, 101 Ia. 576, 70 N. W. 701; Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842.

Kansas: Sanford *v.* Willetts, 29 Kan. 647; Dow *v.* Julien, 32 Kan. 576; Dodson *v.* Cooper, 37 Kan. 346.

Nebraska: Schars *v.* Brand, 27 Neb. 94, 42 N. W. 906.

Texas: Girard *v.* Moore, 86 Tex. 675, 26 S. W. 945; Wilson *v.* Manning (Tex. Civ. App.), 35 S. W. 1079.

Wisconsin: Union Nat. Bank *v.* Cross, 100 Wis. 174, 79 N. W. 992.

turn,[160] together with compensation for loss of use of the goods during the period of detainer.[161] If the goods were sold by the sheriff and the proceeds applied to the satisfaction of the debt or judgment, the amount so applied will usually be deducted from the value,[162] but no allowance will be made for the expenses of the sale.[163] Attorneys' fees or other expenses of litigation for securing the return cannot be recovered.[164]

[160] *Alabama:* Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Mitchell *v.* Corbin, 91 Ala. 599, 8 So. 810.

Georgia: Holton *v.* Taylor, 80 Ga. 508; Jones *v.* Lamon, 92 Ga. 529, 18 S. E. 423.

Kansas: Sanford *v.* Willetts, 29 Kan. 647; Dow *v.* Julien, 32 Kan. 576; Dodson *v.* Cooper, 37 Kan. 346.

New Hampshire: Felton *v.* Fuller, 35 N. H. 226.

New York: Baker *v.* Freeman, 9 Wend. 36; Clark *v.* Hallock, 16 Wend. 607.

Pennsylvania: McInroy *v.* Dyer, 47 Pa. 118; Kline *v.* McCandless, 139 Pa. 223, 20 Atl. 1045; Sensinger *v.* Boyer, 153 Pa. 628, 26 Atl. 222.

Texas: Munster *v.* Fields (Tex.), 33 S. W. 852; R. F. Scott Grocery Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140; Scott *v.* Childers (Tex. Civ. App.), 60 S. W. 775.

Where part of the property is rightly attached, and the remainder illegally attached, and the whole is repurchased by the owner, he may recover the proper proportion of the amount he paid. Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157. And where the property is bought in for the owner not with his money, but with the money of another, the amount cannot be shown in reduction, but the entire value of the property may be recovered. Rogers *v.* McDowell, 134 Pa. 424, 21 Atl. 166.

The right to repurchase the property and charge the wrongdoer with the amount paid must be exercised reasonably. One cannot fix the measure of his own damages by his voluntary act in paying money to recover back from the execution purchaser the property sold. Duncan *v.* Matney, 29 Mo. 368.

[161] *United States:* Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395; Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616.

Georgia: Jones *v.* Lamon, 92 Ga. 529, 18 S. E. 423.

Illinois: Smith *v.* Miller, 145 Ill. App. 606.

Iowa: Turner *v.* Younker, 76 Iowa, 258, 41 N. W. 10; Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842.

Kansas: Adams *v.* Gillam, 53 Kan. 131, 36 Pac. 51.

Texas: R. F. Scott Grocery Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140.

Washington: McGill *v.* W. P. Fuller & Co., 45 Wash. 615, 88 Pac. 1038.

Wisconsin: Union Nat. Bank *v.* Cross, 100 Wis. 174, 79 N. W. 992.

[162] *Alabama:* Mitchell *v.* Corbin, 91 Ala. 599, 8 So. 810; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514.

Arkansas: Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186; Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740; Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

Louisiana: Fush *v.* Egan, 48 La Ann. 60, 19 So. 108.

Texas: Avindino *v.* Beck (Tex. Civ. App.), 73 S. W. 539; Hillman *v.* Edwards (Tex. Civ. App.), 74 S. W. 787; Landes *v.* Eichelberger, 2 Tex. Civ. Cas. 127. But *contra*, where the goods were exempt. Wilson *v.* Manning (Tex. Civ. App.), 35 S. W. 1079.

[163] Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

[164] *Kansas:* Adams *v.* Gillam, 53 Kan. 131, 36 Pac. 51.

§ 565b. Failure to keep safely the property taken.

In a suit against a sheriff for not safely keeping property attached on mesne process, if the owner is entitled to recover the value of the property seized, the damages could not be mitigated by deducting the expenses which would have necessarily attended the keeping, had it been kept safely.[165] And if the property is so carelessly kept that it suffers a deterioration in value, he is responsible for the amount of deterioration.[166] So where one had purchased certain premises on the foreclosure of a mortgage, executed to him by the occupants, and the sheriff neglected for two days to execute a writ of assistance, placed in his hands to put the purchaser in possession, and in the intervening time the occupants greatly injured the premises, the sheriff was held liable for the damage thus sustained. Called on to discharge a duty which the law enjoined of giving possession of property which could only be obtained through such official action by him, it was considered by the court just and legal that he should be held responsible to the full extent of the injury.[167] So, where through the negligence of the officer, a slave arrested by him for a criminal offence, escaped and was drowned, the damages recoverable by the plaintiff, who had but a life estate in the slave, was limited to the value of such estate.[168] In New York, it has been held that where the sheriff so negligently conducts himself in regard to personal property levied on that it is lost, and in consequence the real estate of the defendant is sold, and the security of a mortgage creditor is impaired, no action lies by such mortgage creditor against the sheriff, unless the conduct of the sheriff be explicitly

Texas: Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Lang *v.* Fritz (Tex. Civ. App.), 38 S. W. 233.

Contra in *Louisiana:* State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 13.

[165] *Maine:* Lovejoy *v.* Hutchins, 23 Me. 272.

Massachusetts: Tyler *v.* Ulmer, 12 Mass. 163.

And see *New Hampshire:* Stevens *v.* Sabin, 20 N. H. 529.

The value of the property attached, as stated in the officer's return, and in a receipt taken for it, in the absence of all contradictory proof, may be taken as the true value of the property for which the officer is liable. Willard *v.* Whitney, 49 Maine, 235.

[166] *Alabama:* Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136.

Michigan: Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815.

Wisconsin: Union Nat. Bank *v.* Cross, 100 Wis. 174, 79 N. W. 992.

[167] Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

[168] Tudor *v.* Lewis, 3 Met. (Ky.) 378.

charged to be *fraudulent and with intent* to diminish the security of the mortgage creditors.[169]

§ 565c. Consequential damages.

In an action against the sheriff for wrongful seizure of a stock of goods, their retail value cannot be given in evidence, as it includes profits.[170] Whether damages to the plaintiff's business from such seizure are to be taken into account is a question on which the authorities are at variance; [171] but loss of credit is too remote.[172] Damages may be recovered for detention of goods kept for sale until the season for sale is lost.[173] In an action of replevin against a sheriff, damages sustained from depositing a

[169] Bank of Rome *v.* Mott, 17 Wend. 554. See Yates *v.* Joyce, 11 Johns. 136.

[170] *Colorado:* Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

Idaho: Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122.

Kansas: Bradley *v.* Borin, 53 Kan. 628, 36 Pac. 977 (at least when not alleged in the petition).

New Mexico: Cunningham *v.* Sugar, 9 N. Mex. 105, 49 Pac. 910.

[171] In the following cases damages were not allowed for injury to business:

California: Nightingale *v.* Scannell, 18 Cal. 315.

Wisconsin: Union Nat. Bank *v.* Cross, 100 Wis. 174, 187, 79 N. W. 992.

In the following cases such damages were allowed:

Maryland: Moore *v.* Schultz, 31 Md. 418.

Michigan: McCausey *v.* Hock, 159 Mich. 570, 124 N. W. 570.

Nebraska: Meyer *v.* Fagan, 34 Neb. 184, 51 N. W. 753; Kyd *v.* Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

New York: Kane *v.* Johnston, 9 Bosw. 154 (*semble*).

Texas: Deleshaw *v.* Edelen, 31 Tex. Civ. App. 416, 72 S. W. 413.

In McGill *v.* W. P. Fuller & Co., 45 Wash. 615, 88 Pac. 1038, damages for injury to business were refused because the business was already disorganized and no damages were shown with sufficient certainty.

In Halcomb *v.* Stubblefield, 76 Tex. 310, 13 S. W. 231, the plaintiff was allowed to recover for loss of use of a mill which was caused by an attachment of the machinery.

Loss of profits, not from interruption of the business while it was interrupted but because of the effect of the attachment after resumption of the business, is too remote for recovery. Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499. Therefore, where the attachment did not interrupt the business no damages can be recovered for loss of profits. Charles City Plow Co. *v.* Jones, 71 Ia. 234, 32 N. W. 280.

[172] *Colorado:* Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

New Mexico: Cunningham *v.* Sugar, 9 N. M. 105, 49 Pac. 910.

Texas: R. F. Scott Grocery Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140; Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141.

Wisconsin: Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

Contra in *Nebraska:* Meyer *v.* Fagan, 34 Neb. 184, 51 N. W. 753; Kyd *v.* Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

[173] Knapp *v.* Barnard, 78 Ia. 347.

sum of money with a third party to induce him to become surety in the replevin bond, are altogether too remote and consequential to be considered.[174] In Mississippi the damages for wrongful attachment are declared by statute to be attorney's fees, hotel bills, travelling expenses, loss of trade, and special injury to business. No allowance for counsel fee can be made except for defending the attachment suit, *i. e.*, none for defending the main action, and no damage can be given for loss of trade where it appears that the parties were winding up their business, and none for credit where they were insolvent.[175] The sheriff has no ground for objection in an action against him for a wrongful attachment by his deputy, to an instruction to the jury that the plaintiff is entitled to recover the value of such property exempt from attachment as was attached and thereby wholly lost to him, with interest from the time of the attachment. And if the plaintiff thereby lost the temporary use only of such property, or of the property of other persons, to the use of which he was entitled, then he should recover for the injury from such loss of use. Where attached property was kept in the plaintiff's barn, it was held that if the custody of it had been such as wholly or partially to exclude him from the barn, he was entitled to indemnity for such loss of the use of the barn, so far as it was not occupied by the attached property. But where the plaintiff occupied such barn under a lease, in which he had covenanted to "spend or consume all the hay or other fodder on the premises" produced thereon during the term, he could not recover from the sheriff, who wrongfully executed an attachment obtained by the lessor, damages for being disabled from the fulfilment of this covenant, since the plaintiff could not be answerable to his lessor, who caused the attachment, for not performing the covenant.[176]

If other creditors are induced to attach by the wrongful act of the defendant, no damages can be recovered for the resulting harm.[177] And so where after the attachment a newspaper announced the failure of the plaintiff, whereupon a wholesale

[174] Wilson *v.* Hillhouse, 14 Ia. 199.

[175] Roach *v.* Brannon, 57 Miss. 490; Marqueeze *v.* Sontheimer, 59 Miss. 430; see Comer *v.* Mackintosh, 48 Mich. 374; Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141.

[176] Clapp *v.* Thomas, 7 All. 188.

[177] Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.

dealer refused to forward goods to the plaintiff, it was held that the wrongful attachment was not the cause of this publication, and therefore the defendant was not responsible for the failure to get the goods.[178] In an action for the wrongful attachment of horse and wagon, plaintiff cannot recover the loss of corn in the field which he was unable to gather because he was deprived of the use of the horse and wagon; that was too remote.[179] Where an attachment was enjoined, but it nevertheless was issued, attorney's fees and costs incurred in the injunction proceedings cannot be recovered.[180]

A wife cannot recover for her husband's being thrown out of employment in her business, because of its interruption by the illegal attachment.[181]

§ 565d. Wrongful attachment of land or levy of execution.

An attachment of land, since it does not affect the possession or use of it, does not generally cause actual damages;[182] even if the value depreciates during the attachment, this cannot be recovered.[183] Nor can recovery be had for loss of a sale, where such sale is only contemplated,[184] as where a conditional offer was pending, but the plaintiff was not able to satisfy the condition.[185] Especially where the land was attached on a writ against a third party no damages can be recovered, since the attachment does not even cause a cloud on the title.[186]

Where the land was illegally sold on execution, the owner may waive the invalidity of the sale and recover the entire value of his interest in the land.[187]

[178] Tynberg *v.* Cohen (Tex. Civ. App.), 24 S. W. 314.

[179] Lang *v.* Fritz (Tex. Civ. App.), 38 S. W. 233.

[180] Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141.

[181] Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369.

[182] Adoue *v.* Wettermark, 36 Tex. Civ. App. 585, 82 S. W. 797.

[183] *California:* Heath *v.* Lent, 1 Cal. 410.

Iowa: Tisdale *v.* Major, 106 Iowa, 1, 75 N. W. 663, 68 Am. St. Rep. 263.

Louisiana: Brandon *v.* Allen, 28 La. Ann. 60.

Pennsylvania: Muldoon *v.* Rickey, 103 Pa. 110, 49 Am. Rep. 117.

Texas: Drew *v.* Ellis, 6 Tex. Civ. App. 507, 26 S. W. 95.

[184] Trawick *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. 564.

[185] Drew *v.* Ellis, 6 Tex. Civ. App. 507, 26 S. W. 95.

[186] Duncan *v.* Citizens' Nat. Bank, 20 Ky. L. Rep. 237, 45 S. W. 774.

[187] Pope *v.* Benster, 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703.

§ 566. Suits between different officers.

* Questions of the kind we are now considering frequently arise in suits brought by one officer against another, to test the relative priority of different processes; and in such a case it has been said, in Vermont, that damages are never given beyond the actual value of the property.[188] **

§ 567. Receiptors.

* In some of the States of the Union, property, when levied on, is sometimes delivered by the attaching officer to a third party, called a receiptor, who holds it during the litigation, and promises to redeliver it to the officer on demand. In a case of this kind, in Vermont, the plaintiff, whose property had been unduly levied on, instead of that of the real debtor, brought his action of trespass, and, *pendente lite*, assigned his claim to the receiptor. Judgment was afterwards obtained and execution issued in the suits in which the attachment had been issued, and the officer demanded the property of the receiptor; but he refused to deliver it. It was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receiptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon; [189] and the same point has been similarly decided in Massachusetts.[190]

In another case of this kind, it has been decided in Vermont, that where the value of all the property attached and receipted for is expressed in the receipt at one entire sum, and a portion of it has been withdrawn from the custody of the receiptor, so as to discharge his liability, the damages in an action on the receipt are to be determined by assuming the whole value of the property receipted for to be the sum specified in their receipt, and by then ascertaining, on the basis of that assumed value, the just proportion which the property retained by the receiptor would bear to the property for which he is not liable.[191] **

[188] Goodrich *v.* Church, 20 Vt. 187.

[189] Ellis *v.* Howard, 17 Vt. 330.

[190] Robinson *v.* Mansfield, 13 Pick. 139.

[191] Parsons *v.* Strong, 13 Vt. 235, 37 Am. Dec. 592; Allen *v.* Carty, 19 Vt. 65, 46 Am. Dec. 177. In Connecticut, where the plaintiff, an officer who had, by virtue of an execution, levied on goods belonging to the judgment

So, in New Hampshire where property attached by the sheriff in two suits was delivered to a third party, who gave two receipts for it at the same value, which did not, however, state that one was subject to the other, and the receiptor, after judgment and execution, on a demand in the first suit, paid the amount due on the execution, it was held, after a subsequent judgment in the second suit against the owner, that the receiptor was liable to the officer only for the amount of the value receipted for over that paid in the first suit.[192] Where the receiptor has allowed the attached property to go into the owner's possession, and judgment is recovered against him, in an action by the officer on the receipt, the amount of the judgment and interest, with the fees on execution, not exceeding the value of the property, are the usual measure of damages.[193] But if, while the action is pending, the receiptor refuses to deliver the property to the officer, the latter may recover its full value, with interest from the demand.[194] Where, in an action of trover, the goods for the value of which the action was brought had been attached and delivered to the defendant on his receipt, and he had retained them, this was held no reason for reducing the damages below their value.[195] The valuation stated in the receipt is usually conclusive on the receiptor;[196] but where the goods were returned to the sheriff and sold by him for a less sum than that stated in the receipt, and he brought action, alleging that they were damaged, it was held that the valuation in the receipt was not conclusive, and the sheriff must prove the amount of his loss.[197] Where the property receipted for is an animal which dies in the receiptor's possession without his default, he is not liable for its value.[198]

debtor, and delivered them to the defendants on their receipt or promise to redeliver, which not being done, suit was brought; it was objected that, as it was not stated in the declaration that the officer was commanded, in the writ against the original debtor, to attach to any certain amount, the plaintiff could only recover nominal damages; but the Supreme Court held otherwise, and that the omission did not preclude the plaintiff from a recovery to the amount of the execution. Jones *v.* Gilbert, 13 Conn. 507.

[192] Haynes *v.* Tenney, 45 N. H. 183.

[193] Foss *v.* Norris, 70 Me. 117.

[194] Clement *v.* Little, 42 N. H. 563.

[195] Luckey *v.* Roberts, 25 Conn. 486.

[196] Healy *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332.

[197] Bancroft *v.* Parker, 13 Pick. 192.

[198] Shaw *v.* Laughton, 20 Me. 266.

§ 568. Illegal sale on execution.

Where a legal execution is levied upon property, but the sheriff's sale is for any reason illegal, the owner is entitled to compensation for the wrong thus done him. If the sale itself could not legally be made, the measure of damages is the value of the property, not at the time of the original attachment and levy but at the time of the sale.[199] If, however, the sale was permitted, but irregularly conducted, as a result of which the goods were sold under their fair value, the sheriff is responsible for the difference between such value and the price realized at the sale.[200]

§ 569. Exclusion from office.

Where a public officer is wrongfully excluded from his office, the measure of damages is the amount of his salary during the period of exclusion,[201] deducting, however, if the defendant acted in apparent right and good faith, his reasonable expense in earning it.[202] In United States *v.* Addison [203] it was contended that the rule requiring diligence in seeking employment ought to be extended to the case of a public officer wrongfully ousted from his office. But the court held that "no such rule can be applied to public offices of personal trust and confidence." Where, however, an officer wrongfully excluded from office brings mandamus for reinstatement, and is entitled after reinstatement to the entire salary, his damages in the writ of mandamus will be nominal only.[204]

[199] Walker *v.* Wilmarth, 37 Vt. 289.

[200] Daggett *v.* Adams, 1 Me. 198.

[201] *Kansas:* Rule *v.* Tait, 38 Kan. 765.

New York: People *v.* Nolan, 32 Hun, 612.

England: Arris *v.* Stukely, 2 Mod. 260.

[202] Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52.

[203] 6 Wall. 291, 18 L. ed. 919.

[204] Hill *v.* Fitzgerald, 193 Mass. 569, 79 N. E. 825.

CHAPTER XXV

ACTIONS FOR THE DEATH OF A HUMAN BEING

§ 570. No recovery for death at common law.
570a. Recovery for injury which finally results in death.
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583. Reduction of damages.
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584a. Presumptions and pleading.
585. Contributory negligence.

§ 570. No recovery for death at common law.[1]

* At common law, and independently of statutory provision, the death of a human being is not the ground of an action for damages.[2] In a case where the plaintiff brought an action against the proprietors of a stagecoach for negligent driving, by which his wife was killed, Lord Ellenborough said that, "in a civil court, the death of a human being cannot be complained of as an injury." [3] And so it has been held in Massachusetts, in a case where a widow sued a railroad company for negligence, by which her husband had been killed.[4]

In New York, in an action on the case [5] for negligently running over and killing the plaintiff's son, a lad of ten years of

[1] It is scarcely necessary to say that what is said here did not apply during the existence of slavery to an action for the death of a slave.

[2] Insurance Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580, and cases cited.

[3] Baker *v.* Bolton, 1 Camp. 493.

[4] Carey *v.* Berkshire R. R., 1 Cush. 475, 48 Am. Dec. 616.

[5] Ford *v.* Monroe, 20 Wend. 210.

age, the judge charged that the plaintiff was entitled to recover such sum by way of damages as they would be of the opinion the services of the child would have been worth, until he became twenty-one years of age. The case was carried up, but no question seems to have been distinctly made as to the correctness of this direction.[6] And in a subsequent case in the same State, where the plaintiff's infant child died within an hour and a half after the injury, Bronson, J., delivering the opinion of the Court of Appeals, said: "I have a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and funeral expenses"; but the point was not decided.[7] ** It is, however, now well settled that no action will lie at common law for the tortious killing of a human being,[8] even for the payment of the funeral expenses,[9] or for loss of service.[10] The rule is the same in admiralty, in the absence of an Act of Congress or a State statute giving a right of action.[11] In Louisiana, however, a State governed by the civil law, an action will lie for pecuniary and other damages caused by death.[12]

But it seems that where there is a cause of action entirely independent of the act of killing, damages, at least pecuniary damages, may be recovered for death that proximately follows as a result of the injury. So where the defendant sold to the plaintiff tinned salmon, with the warranty that they were fit for food, and the plaintiff's wife was poisoned by eating the salmon and died, it was held in England that the husband in

[6] *Acc.*, Drew *v.* Sixth Ave. R. R., 26 N. Y. 49.

[7] Pack *v.* New York, 3 N. Y. 489.

[8] *Indiana:* Mayhew *v.* Burns, 103 Ind. 330, 2 N. E. 793.

Michigan: Hyatt *v.* Adams, 16 Mich. 179.

England: Osborn *v.* Gillett, L. R. 8 Ex. 88.

[9] Jackson *v.* Pittsburgh, C., C. & S. L. Ry., 140 Ind. 241, 39 N. E. 664, 49 Am. St. Rep. 192.

[10] Gulf, C. & S. F. Ry. *v.* Beall, 91 Tex. 310, 42 S. W. 1054.

[11] The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. 140; Rundell *v.* Compagnie Gen. Transatlantique, 100 Fed. 665, 40 C. C. A. 625; La Bourgogne, 117 Fed. 261. If such a statute exists, but no lien is expressly created by it, a libel *in rem* will not be entertained. The Corsair, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. 949. Whether a libel against the owners *in personam* will lie, *query*. *Ib.* 343, 347; *cf. Ex parte* McNiel, 13 Wall. 236, 20 L. ed. 624.

[12] McCubbin *v.* Hastings, 27 La. Ann. 713; LeBlanc *v.* Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303. See Rice *v.* Crescent City R. R., 51 La. Ann. 108, 24 So. 791.

an action for breach of warranty might recover for the loss of her services.[13]

§ 570a. Recovery for injury which finally results in death.

There may, of course, be an action at common law for an injury finally resulting in death, apart from any statute. Thus, a father may recover if the death was not instantaneous, for loss of service from the injury to the time of the death; [14] and a husband may maintain an action for the loss of his wife's services, caused by an injury done her by the defendant's malpractice, notwithstanding the injury resulted in her death; but the recovery should be only for the loss of her services between the injury and the death, and without including damages for her mental suffering; [15] and he may also recover for her funeral expenses.[16] So a father may recover for the medical expenses incurred by him on account of his minor child, injured by the defendant, between the injury and the death; [17] and an executor may recover the damage to the personal estate to the deceased by medical expenses and loss of time.[18]

§ 570b. Survival by statute of right of deceased.

In some States, by statute, actions for personal injuries survive to the representatives of the injured person, and in such cases the damages recoverable are those which the injured person could have recovered had he survived, being such dam-

[13] Jackson *v.* Walton, [1899] 2 K. B. 193. In a case in Massachusetts, however, in an action against a physician for breach of contract to render medical services to the plaintiff's wife, where the defendant's breach of contract resulted in the wife's death, the court, though allowing for the additional expenditures during her lifetime that resulted from the breach refused all damages for the death itself. Knowlton, C. J., said: "The decisions exclude, as a ground of recovery, all elements of damage which arise solely from death, and as to such damage they are applicable to actions of contract as to actions of tort." Sherlag *v.* Kelley, 200 Mass. 232, 86 N. E. 293.

[14] *Arkansas:* Davis *v.* Ry., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283 (no recovery for services after date of death).

Indiana: Pennsylvania Co. *v.* Lilly, 73 Ind. 252.

[15] Hyatt *v.* Adams, 16 Mich. 180.

[16] Philby *v.* Northern Pac. R. R., 46 Wash. 173, 89 Pac. 469, 9 L. R. A. (N. S.) 1193, and cases cited.

[17] Binford *v.* Johnston, 82 Ind. 431; Mayhew *v.* Burns, 103 Ind. 329, 2 N. E. 793.

[18] Bradshaw *v.* Lancashire & Y. Ry., L. R. 10 C. P. 189.

ages as he suffered up to the time of his death.[19] In New Hampshire, in such an action, it is said that the administrator may recover for distress and anxiety of mind experienced by the deceased while in imminent danger, in view of impending death.[20] Under the Kentucky statute, it is held that an appreciable interval must elapse between the injury and the death for the action to survive; [21] and the same interpretation is given to the statute in other jurisdictions.[22] But in other States still this interpretation has been rejected, and recovery allowed though the death was instantaneous.[23]

In Michigan, the representative of the deceased may recover the amount decedent would have earned during the period of his expectancy of life, without deduction of the probable expense of living.[24]

[19] *Connecticut:* Goodsell *v.* Hartford & N. H. R. R., 33 Conn. 51.

Iowa: Muldowney *v.* Illinois C. Ry., 36 Ia. 462.

Massachusetts: Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68.

Michigan: Oliver *v.* Houghton C. S. Ry., 134 Mich. 367, 96 N. W. 434; Davis *v.* Michigan Cent. R. R., 147 Mich. 479, 111 N. W. 76.

Montana: Beeler *v.* Butte & L. C. D. Co., 41 Mont. 465, 110 Pac. 528.

New Hampshire: Clark *v.* Manchester, 62 N. H. 577.

Tennessee: Freeman *v.* Illinois C. R. R., 107 Tenn. 340, 64 S. W. 1.

The same measure of damages prevails in Louisiana where action is brought by the representative of a deceased person (as it may there be brought without the aid of a statute) for a personal injury to the deceased. Payne *v.* Georgetown Lumber Co., 117 La. 893, 42 So. 475.

[20] Corliss *v.* Worcester, N. & R. R. R., 63 N. H. 404.

[21] Hansford *v.* Payne, 11 Bush (Ky.), 380.

[22] *United States:* The Corsair, 145 U. S. 335, 348, 36 L. ed. 727, 12 Sup. Ct. 949.

Massachusetts: Kearney *v.* Boston & W. R. R., 9 Cush. 108; Hollenbeck *v.* Berkshire R. R., 9 Cush. 478; Kennedy *v.* Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 214; Moran *v.* Holling, 125 Mass. 93.

Mississippi: Illinois C. R. R. *v.* Pendergrass, 69 Miss. 425, 12 So. 954.

Montana: Dillon *v.* Great Northern Ry., 38 Mont. 485, 100 Pac. 960.

South Dakota: Belding *v.* Black Hills & Ft. P. R. R., 3 S. D. 369, 53 N. W. 750.

[23] *New Hampshire:* Clark *v.* Manchester, 62 N. H. 577.

Tennessee: Nashville & C. R. R. *v.* Prince, 2 Heisk. 580; Foulkes *v.* Nashville & D. R. R., 9 Heisk. 829.

Cf. Murphy *v.* New York & N. H. R. R., 30 Conn. 184; Broughel *v.* Southern N. E. Tel. Co., 72 Conn. 621, 45 Atl. 437, 49 L. R. A. 404.

Under a Tennessee statute giving damages for death to the next of kin (see § 571) and also for the mental and bodily suffering to the deceased, it has been said that even if the proof showed instantaneous death, it would still be a question for the jury whether some intermediate suffering was not caused. Western & A. R. R. *v.* Robinson, 61 Fed. 592, 601.

[24] Olivier *v.* Houghton C. S. Ry., 138

This action, allowed to survive by statute, exists independdently of, and in addition to, the action for death, commonly called Lord Campbell's Act.[25]

§ 571. Statutes.

* The remissness of the common law in this respect has been cured by various statutes. In England, the 9 & 10 Vict., c. 93, commonly known as Lord Campbell's act, provides, that whenever the death of a person shall be caused by a wrongful act, and which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable, notwithstanding the death. So, in Massachusetts,[26] if the life of any passenger is lost by the negligence, etc., of the proprietors of a railroad, etc., or of their servants, the proprietors shall be liable to a fine, not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment for the benefit of the widow and heirs.

And in New York, a statute [27] provides, that whenever the death of any person shall be caused by any wrongful act or neglect, the party who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured, and although the act be felonious. This statute is taken from the English statute above cited, and the second section provides that the action is to be brought by the personal representatives of the deceased, and that "in every such action the jury may give such damages as they deem a fair and just compensation, not exceeding five thousand dollars, with reference to the injuries resulting from such death, to the person." ** These statutes are the basis of legislation in probably every jurisdiction where the common law prevails. The action for damages for negligently causing death is usually given by statute to the personal representatives of the deceased for the benefit of the "widow or next of kin," or, as in New York, of the "husband or wife and next of kin," although, in some of the States, the wording of the English

Mich. 242, 101 N. W. 530, 11 Det. Leg. N. 559.

[25] Stewart *v.* United E. L. & P. Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384.

[26] Stat. 1840, c. 80; Pub. Stats., c. 112, § 212.

[27] Laws of 1847, c. 450.

statute, "wife, husband, parent, child," is followed. The damages are usually limited to compensation for the "pecuniary injuries" resulting from the death.

§ 571a. Limitation of amount of recovery.

In many of the earlier statutes the amount that could be recovered was arbitrarily limited to $5,000, which in later statutes has often been increased to $10,000.[28] This arbitrary limitation of the amount of recovery was no doubt due to the same feeling which led the courts to refuse an action for death: the difficulty of estimating in money the value of a life. But any such arbitrary limitation is of course diametrically opposed to the fundamental nature of damages: that they are a judicially ascertained compensation for wrong. Any such effort on the part of the legislature to fetter the courts in the assessment of compensation is a return to the methods of the Anglo-Saxons; and the tendency is, and must be, to abolish the statutory limitation. In a considerable number of States there is now no limitation on the amount of compensation. The removal of this limit does not change the rule for the assessment of damages, which are still to be measured by the loss to the relatives.[29] It has, however, been intimated in the Federal courts that these statutory limits may be taken as a guide to the permissible amount of damages, even in States where there is no limitation in the statute.[30]

§ 571b. Varying types of statute.

For the specific provision of the statute as it exists in the various States reference must be had to the laws of those States. Several types of statutes have been passed, and should be distinguished. The commonest form is that giving to some one representing the relatives a right to recover the pecuniary loss to them from the death. In a few States the suit may be brought for the loss to the estate.[31] In several States there is no

[28] Tobin *v.* Missouri Pac. Ry. (Mo.), 18 S. W. 996; Lee *v.* Mo. Pac. Ry., 195 Mo. 400, 92 S. W. 614.

[29] Howell *v.* Rochester Ry., 49 N. Y. Supp. 17.

[30] Cheatham *v.* Red River Line, 56 Fed. 248; The Oceanic, 61 Fed. 338; Farmers' L. & T. Co. *v.* Toledo A. A. & N. M. Ry., 67 Fed. 73.

[31] *United States:* Linss *v.* Chesapeake & O. Ry., 91 Fed. 964 (Kentucky); Jennings *v.* Alaska Treadwell Gold Mining Co., 170 Fed. 146, 95 C. C. A. 388 (Oregon & Alaska).

pecuniary measure, but the jury is authorized to award such damages as are "fair and just," [32] or "proportionate to the injury." [33] In Alabama they are punitive, and not measured by the pecuniary loss,[34] and this is also the case in other States, where the jury is allowed to award a sum, under a certain limit, in proportion to the wrong.[35] In Georgia a statute allowing the jury to give the full value of the life, without making any deduction for the expense of living, is constitutional.[36]

§ 571c. Election of remedies.

The statute may furnish an alternative remedy to that given by the common law, and in that case a plaintiff must make an election between the two. So, where as in New York, a father can recover damages for the loss of service of his son, from a person who negligently caused his death, independent of the statute, it is held that a recovery under the statute will bar an action on the former ground.[37] And so it has been held that a recovery under the statute will bar an action by the husband to recover damages for the loss of the wife's society between the injury and the death.[38] In these cases the damages sought

Connecticut: McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Wilmot *v.* McPadden, 79 Conn. 367, 65 Atl. 157.

New Hampshire: Carney *v.* Concord St. R. R., 72 N. H. 364, 57 Atl. 218.

[32] *Illinois:* Ohio & M. Ry. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760; Brennen *v.* Chicago & Carterville Coal Co., 147 Ill. App. 263.

Michigan: Wynning *v.* Detroit L. & N. R. R., 59 Mich. 257, 26 N. W. 514.

Montana: Butte E. R. R. *v.* Jones, 164 Fed. 308, 18 L. R. A. (N. S.) 1205.

Virginia: Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838; Norfolk & W. Ry. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

West Virginia: Turner *v.* Norfolk & W. R. R., 40 W. Va. 675, 22 S. E. 83.

See Parker *v.* Lumber Co., 115 La. 463,39 So. 445; Chesapeake & O. Ry. *v.* Hawkins, 174 Fed. 579, 98 C. C. A. 443 (W. Va.).

[33] Strother *v.* South C. & G. R. R., 47 S. C. 375, 25 S. E. 272; Mason *v.* Southern Ry., 58 S. C. 70, 36 S. E. 440.

[34] Sloss-Sheffield Steel & Iron Co. *v.* Drane, 160 Fed. 780, 88 C. C. A. 34 (Ala.); Savannah, etc., R. R. *v.* Shearer, 58 Ala. 672; Richmond, etc., R. R. *v.* Freeman, 97 Ala. 289, 11 So. 800; Kansas City, etc., R. R. *v.* Sanders, 98 Ala. 293, 13 So. 57.

[35] Childress *v.* Southwest Missouri R. R., 126 S. W. 169, 141 Mo. App. 667; O'Connell *v.* Mo. Pac. Ry, 131 S. W. 117, 149 Mo. App. 501; Erwin *v.* St. L. I. M. & S. Ry. (Mo. App.), 139 S. W. 498; Dale *v.* Atchison, T. & S. F. R. R., 57 Kan. 601, 47 Pac. 521 (New Mexico).

[36] Clay *v.* Central R. & B. Co., 84 Ga. 345, 10 S. E. 967.

[37] McGovern *v.* New York C. & H. R. R. R., 67 N. Y. 417.

[38] Louisville & N. R. R. *v.* McElwain, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788, 56 Am. St. Rep. 385.

in the common-law action are included in the damages recovered for the death. In a few cases it is held that a voluntary settlement with the wrongdoer by the person injured bars a subsequent action for the homicide.[39] These decisions, however, seem to be of questionable soundness; for the cause of action of the deceased, even if by statute it is allowed to survive, is entirely distinct from that given by the statutes for causing death, and settlement for one should not bar action upon the other right.[40] So judgment in an action for the death does not bar an action by the estate for the personal injury which survives by statute.[41]

§ 572. General principles.

The decisions in cases arising under the statutes are not in entire harmony, and many of them go farther in the allowance of damages than a correct interpretation of the statutes would seem to justify. The courts have found difficulty in giving to the jury any satisfactory rule under which the damages in a given case could be estimated. Loose directions have in consequence been often given to the jury, who, influenced as it would seem by sentimental considerations, have in many cases awarded damages where the life destroyed was without present or prospective value. In Pennsylvania Railroad *v.* Keller [42] it is said that the life is to be regarded as property to be compensated for, "without regard to past earnings or capacity to earn at the time of death," and that the controversies which would arise, if the opposite rule were adopted, would be "repugnant and of-

[39] *Georgia:* Southern Bell Tel. Co. *v.* Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694.

Vermont: Legg *v.* Britton, 64 Vt. 652.

England: Read *v.* Great Eastern Ry., L. R. 3 Q. B. 555.

[40] *Minnesota:* Mageau *v.* Great No. Ry., 106 Minn. 375, 115 N. W. 651, 15 L. R. A. (N. S.) 511, and cases cited.

Wisconsin: Brown *v.* Chicago & N. W. Ry., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579. See *ante*, § 570*b*.

The fact that there is pending an action by a father for causing death of a minor son will not operate to reduce damages in an action by the mother for the death of same child. Augusta R. R. *v.* Glover, 92 Ga. 132, 18 S. E. 406. The supposed incompatibility of the two species of remedy has been much discussed, and the weight of authority is as stated in the text. See Sweetland *v.* Chicago & G. T. R. R., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568; Sedg. El. of Dam. 177.

[41] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Sweet, 63 Ark. 563, 40 S. W. 463.

Vermont: Needham *v.* Grand Trunk Ry., 38 Vt. 294.

England: Leggott *v.* Great N. Ry., 1 Q. B. D. 599.

[42] 67 Pa. 300.

fensive to the sensibilities of every person." [43] It is submitted, with great deference, that this reasoning is unsound. Life, by the common law, was not property; its loss, however injurious, was not the subject of a civil action for damages. The former rule has only been modified by this statute, under which juries are allowed to give, in most of the States, damages for *pecuniary injuries* only; and all considerations as to the results of this view to the sensibilities of individuals are purely sentimental, and can have no weight in determining the proper scope of the statute. It would seem, in the absence of judicial construction, that the term "pecuniary injury" meant an injury resulting in the loss of money, either present or prospective, and proximate. A somewhat wider signification has been given to it by Denio, J., in Tilley *v.* The N. Y. C. & H. R. R.,[44] and embodies the interpretation which seems to have been generally adopted by the courts. In this case the action was brought to recover damages for the death of a mother, leaving surviving her children of tender years. The learned judge said: "The word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value." The learned judge regarded the loss of nurture, of intellectual, moral, and physical training, and of "such instruction as can only proceed from a mother," as essential to the future well-being of the children, and as, therefore, falling within the term "pecuniary," as used in the statute.[45] Under this interpretation of the word, three classes of cases would be embraced: (1) Those where there is a present pecuniary loss; (2) those where there is a prospective pecuniary loss; and (3) those in which the death deprives the claimant of services which would, in the ordinary course of events, result in a pecuniary value to him. A given case may embrace any or all of these elements.

[43] See, also, North P. R. R. *v.* Robinson, 44 Pa. 175.

[44] 24 N. Y. 471, 476.

[45] See, also, McIntyre *v.* New York C. R. R., 37 N. Y. 287.

Definite instructions should be given to the jury as to the true measure of damages under the statute; [46] although much must be left, it is said, to their sound discretion.[47] This is inevitable in the case of damages incapable of definite pecuniary measurement.[48]

Since the action by the statute is given only to a person damaged by the death, the action will not lie where there is no damage, and nominal damages therefore cannot be recovered.[49]

§ 573. Pecuniary loss.

The plaintiff on the common form of statute can recover the pecuniary loss only.[50] The rule governing the jury in their estimate of the pecuniary loss is, of course, the ordinary one, that the injured person shall receive compensation for the loss sustained; when it becomes necessary to determine the particular items of that loss, the question arises whether the principle of liability under the statute is the same as if the injured party had survived and brought the action. In Whitford *v.* The Panama Railroad [51] the court said:

[46] *United States:* Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641.

Idaho: Holt *v.* Spokane & P. Ry., 3 Ida. 703, 35 Pac. 39.

Iowa: Coates *v.* B. C. R. & N. Ry., 62 Ia. 486, 17 N. W. 760.

Kentucky: Louisville & N. R. R. *v.* Case, 9 Bush, 728.

Missouri: McGowan *v.* St. Louis O. & S. Co., 109 Mo. 518, 19 S. W. 199.

Pennsylvania: Pennsylvania R. R. *v.* Vandever, 36 Pa. 298; Philadelphia & R. R. R. *v.* Adams, 89 Pa. 31.

Texas: Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

[47] *Missouri:* Stoher *v.* St. Louis, I. M. & S. Ry., 91 Mo. 509, 4 S. W. 389.

Pennsylvania: Pennsylvania R. R. *v.* Ogier, 35 Pa. 60, 78 Am. Dec. 322.

[48] Countryman *v.* Fonda, 166 N. Y. 201, 59 N. E. 822, 82 Am. St. Rep. 640.

[49] Bader *v.* Galveston, H. & S. A. Ry. (Tex. Civ. App.), 137 S. W. 718.

[50] *United States: In re* California N. & I. Co., 110 Fed. 678.

Illinois: Consolidated Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715; Ill. Cent. R. R. *v.* Whiteaker, 122 Ill. App. 333.

Indiana: Louisville & N. R. R. *v.* Gollihur, 40 Ind. App. 480, 82 N. E. 492.

Michigan: Van Brunt *v.* Cincinnati, J. & M. R. R., 78 Mich. 530, 44 N. W. 321.

New Mexico: Cerrillos Coal R. R. *v.* Deserant, 9 N. M. 49, 49 Pac. 307.

Texas: St. Louis, A. & T. Ry. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; McGown *v.* International & G. N. R. R., 85 Tex. 289, 20 S. W. 80; Texas & N. O. Ry. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140.

Ireland: Bourke *v.* Cork & M. Ry., 4 L. R. Ire. 682; Holleran *v.* Bagnell, 6 L. R. Ire. 333.

[51] 23 N. Y. 465, 469. But see dissenting opinion of Comstock, J.

"Although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages are, nevertheless, given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss and, in addition, for his pain and suffering of mind and body; while, under the statute, it is not the recompense which would have belonged to him which is awarded to his personal representative, but the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and next of kin."

This case has been generally followed. The same view is taken by Mr. Justice Coleridge, in Blake *v.* The Midland Railway [52] where he says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family." [53] The statute contemplates compensation to the widow, next of kin, etc., *from the death*, not for the injuries to the deceased from the *wrongful act*. The same reasoning leads to the conclusion that expenses for medical attendance, funeral expenses, etc., are not proper items of damages under the statute,[54] although in this country generally the medical expenses and the funeral expenses attendant upon the burial of the deceased may be recovered, where any of those for whose benefit the action is brought are legally bound to pay such expenses.[55] But as these expenses would be necessarily incurred

[52] 18 Q. B. 93.

[53] See *acc.*, Cleveland & P. R. R. *v.* Rowan, 66 Pa. 393.

[54] *United States:* Holland *v.* Brown, 35 Fed. 43; Hutchinson *v.* West. J. & S. R. R., 170 Fed. 615.

Arkansas: St. Louis, etc., R. R. *v.* Sweet, 57 Ark. 287, 21 S. W. 587.

California: Gay *v.* Winter, 34 Cal. 153; Salmon *v.* Rathjens, 152 Cal. 290, 92 Pac. 733.

Delaware: Wilcox *v.* Wilmington City Ry., 2 Pennew. 157, 44 Atl. 686.

New Jersey: Consolidated Traction Co. *v.* Hone, 60 N. J. L. 444, 38 Atl. 759.

England: Boulter *v.* Webster, 13 W. R. 289; Dalton *v.* Southeastern Ry., 4 C. B. (N. S.) 296. They may be recovered in an action of *contract*. Pulling *v.* Great Eastern Ry., 9 Q. B. D. 110.

[55] *Arkansas:* Little Rock & F. S. Ry. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

California: Cleary *v.* City R. R., 76 Cal. 240, 18 Pac. 269.

District of Columbia: Bunyea *v.* Metropolitan R. R., 19 D. C. 76.

Georgia: Augusta Factory *v.* Davis, 87 Ga. 648, 13 S. E. 577; Southern R. R. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253.

Kentucky: Eden *v.* Lexington R. R., 14 B. Mon. 204.

Missouri: Owen *v.* Brockschmidt, 54

at some time for the deceased, the reason for charging them as items of damage, under the statute, is not apparent.

Nor can recovery be had for any injury to the plaintiff except what results directly from the death.[56] So no damages can be recovered for injuries to the widow's health caused by overwork.[57] And where the plaintiff was the partner as well as next of kin to the deceased, no compensation could be recovered for dissolution of the partnership.[58] As the court said in the last case, the statute gives damages "for injuries resulting from the severance of a relation of kinship and not of contract."

§ 573a. Non-pecuniary loss.

Since the pecuniary loss alone may be recovered, consideration of all non-pecuniary injuries is forbidden. So damages for the mental and physical sufferings of the deceased cannot be recovered under the statute.[59] And for the same reason no damages

Mo. 285; Rains *v.* St. Louis, I. M. & S. Ry., 71 Mo. 164, 36 Am. Rep. 459.

New York: Murphy *v.* New York C. & H. R. R. R., 88 N. Y. 445.

Pennsylvania: Pennsylvania R. R. *v.* Bantom, 54 Pa. 495; Cleveland & P. R. R. *v.* Rowan, 66 Pa. 393.

South Carolina: Petrie *v.* Columbia & G. R. R., 29 S. C. 303, 7 S. E. 515.

Texas: Gulf, C. & S. F. Ry. *v.* Southwick (Tex. Civ. App.), 30 S. W. 592.

Washington: Dean *v.* Oregon R. & Nav. Co., 44 Wash. 564, 87 Pac. 824; Philby *v.* Northern Pac. Ry., 46 Wash. 173, 89 Pac. 468, 9 L. R. A. (N. S.) 1193.

In Kentucky, by statute, the funeral expenses are to be taken out of the amount recovered. O'Malley *v.* McLean, 113 Ky. 1, 23 Ky. L. Rep. 2258, 67 S. W. 11.

[56] East Tenn., V. & G. R. R. *v.* Toppins, 10 Lea (Tenn.), 58.

[57] Elshire *v.* Schuyler, 15 Neb. 561.

[58] Demarest *v.* Little, 47 N. J. L. 28.

[59] *United States:* Illinois Central Ry. *v.* Barron, 5 Wall. 90, 18 L. ed. 591; Holland *v.* Brown, 35 Fed. 43; Hall *v.* Galveston, H. & S. A. Ry., 39 Fed. 18; Kelley *v.* Central R. R., 48 Fed. 663, 5 McCr. 653; St. Louis & S. F. Ry. *v.* Hicks, 79 Fed. 262, 24 C. C. A. 563; McLaughlin *v.* Hebron Mfg. Co., 171 Fed. 269.

Alabama: James *v.* Richmond & D. R. R., 92 Ala. 231, 9 So. 335.

California: Cleary *v.* City R. R., 76 Cal. 240, 18 Pac. 269.

District of Columbia: Bunyea *v.* Metropolitan R. R., 19 D. C. 76.

Florida: Florida, C. & P. R. R. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Illinois: Spaulding *v.* Chicago, St. P. & K. C. R. R., 98 Ill. 205, 67 N. W. 227; Holton *v.* Daly, 106 Ill. 131; Maney *v.* Chicago, etc., R. R., 49 Ill. App. 105; West Chicago St. R. R. *v.* Foster, 74 Ill. App. 414; St. Louis E. S. R. R. *v.* Burns, 77 Ill. App. 529; Wetherell *v.* Chicago City R. R., 104 Ill. App. 357.

Indiana: Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72.

Iowa: Donaldson *v.* Mississippi & M. R. R., 18 Ia. 280, 87 Am. Dec. 391; Dwyer *v.* Chicago, S. P. M. & O. Ry., 48 Ia. 479, 51 N. W. 244, 35 Am. St. Rep. 322.

Kentucky: Louisville & N. Ry. *v.* Coniff, 90 Ky. 560, 14 S. W. 543; Louis-

can be given, under the statute, for mental suffering and grief occasioned by the death of the deceased to the plaintiff, or for his wounded affections.[60] Nor can damages be recovered for the

ville & N. R. R. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29; Oakes *v.* Maine Cent. R. R., 95 Me. 103, 49 Atl. 418.

Michigan: Mynning *v.* Detroit, L. & N. R. R., 59 Mich. 257.

Minnesota: Hutchins *v.* St. Paul, M. & M. Ry., 44 Minn. 5, 46 N. W. 79.

New Jersey: Telfer *v.* N. R. R., 30 N. J. L. 188.

New York: Whitford *v.* Panama R. R., 23 N. Y. 465.

Oregon: Carlson *v.* Oregon, S. L. & U. N. Ry., 21 Ore. 450, 28 Pac. 497.

Rhode Island: McCabe *v.* Narragansett E. L. Co., 26 R. I. 427, 59 Atl. 112.

South Carolina: Stuckey *v.* Atlantic C. L. R. R., 60 S. C. 237, 38 S. E. 416.

Texas: Cotton Press Co. *v.* Bradley, 52 Tex. 587.

England: Blake *v.* Midland Ry., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233.

Contra, under the *Tennessee* statute: Louisville & N. R. R. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840; Railroad Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434. Query under the *Virginia* statute: Baltimore & O. R. R. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

[60] *United States:* Holland *v.* Brown, 35 Fed. 43 (Ore. Stat.); Kelley *v.* Central R. R., 48 Fed. 663, 4 McCr. 653.

Alabama: James *v.* Richmond & D. R. R., 92 Ala. 231, 9 So. 335.

Arkansas: Little Rock & F. S. Ry. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 418; Helena Gas Co. *v.* Rodgers, 135 S. W. 904.

California: Munro *v.* Pacific C. D. & R. R., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248 (explaining Cleary *v.* City R. R., 76 Cal. 240, 18 Pac. 269); Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Bond *v.* United Railroads, — Cal. —, 113 Pac. 366.

District of Columbia: Bunyea *v.* Metropolitan R. R., 19 D. C. 76.

Florida: Florida, C. & P. R. R. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Illinois: Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago & R. I. R. R. *v.* Morris, 26 Ill. 400; Chicago, B. & Q. R. R. *v.* Harwood, 80 Ill. 88; Chicago City R. R. *v.* Gillam, 27 Ill. App. 386; Chicago Consol. Bottling Co. *v.* Tietz, 37 Ill. App. 599; Chicago & W. I. R. R. *v.* Ptacek, 62 Ill. App. 375; West C. S. R. R. *v.* Dooley, 76 Ill. App. 424; St. Louis E. S. R. R. *v.* Burns, 77 Ill. App. 529.

Indiana: Ohio & M. R. R. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Indianapolis C. Club *v.* Hilliker, 20 Ind. App. 239, 50 N. E. 578; Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Iowa: Spaulding *v.* Chicago, St. P. & K. C. R. R., 98 Ia. 205, 67 N. W. 227.

Kentucky: Covington St. R. R. *v.* Packer, 9 Bush, 455, 15 Am. Rep. 725; Louisville & N. R. R. *v.* Graham, 98 Ky. 688, 34 S. W. 229; Louisville & N. R. R. *v.* Creighton, 106 Ky. 42, 50 S. W. 227.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29; Oakes *v.* Maine Cent. R. R., 95 Me. 103, 49 Atl. 418.

Maryland: Agricultural & M. Assoc. *v.* State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507; Baltimore & R. T. *v.* State, 71 Md. 573.

Michigan: Mynning *v.* Detroit, L. & N. R. R., 59 Mich. 257, 26 N. W. 514.

Minnesota: Hutchins *v.* St. Paul, M. & M. Ry., 44 Minn. 5, 46 N. E. 79.

Missouri: Barth *v.* Kansas City El. Ry., 142 Mo. 535, 44 S. W. 778; Cal-

loss of the society of the deceased.[61] Thus a husband cannot

caterra *v.* Iovaldi, 123 Mo. App. 347, 100 S. W. 675.

Nebraska: Anderson *v.* Chicago, B. & Q. R. R., 35 Neb. 95, 52 N. W. 840; Johnson County *v.* Carmen, 71 Neb. 682, 99 N. W. 502.

New York: Smith *v.* Lehigh V. R. R., 177 N. Y. 379, 69 N. E. 729.

North Carolina: Byrd *v.* Southern Exp. Co., 139 N. C. 273, 51 S. E. 851.

Ohio: Steel *v.* Kurtz, 28 Oh. St. 191; Cincinnati St. Ry. *v.* Altemeier, 60 Oh. St. 10, 53 N. E. 300.

Oregon: Carlson *v.* Oregon S. L. & U. N. Ry., 21 Ore. 450, 28 Pac. 497.

Pennsylvania: Pennsylvania R. R. *v.* Vandever, 36 Pa. 298; Caldwell *v.* Brown, 53 Pa. 453; Pennsylvania R. R. *v.* Butler, 57 Pa. 335; Pennsylvania R. R. *v.* Goodman, 62 Pa. 329; McHugh *v.* Schlosser, 159 Pa. 480, 28 Atl. 291, 39 Am. St. Rep. 669, 23 L. R. A. 574.

Rhode Island: Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634; McCabe *v.* Narragansett E. L. Co., 26 R. I. 427, 59 Atl. 112.

Tennessee: Nashville & C. R. R. *v.* Stevens, 9 Heisk. 12; Knoxville, C. G. & L. R. R. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434.

Texas: Storrie *v.* Marshall (Tex. Civ. App.), 27 S. W. 224; Gulf, C. & S. F. Ry. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51; Houston & T. C. R. R. *v.* Loeffler (Tex. Civ. App.), 51 S. W. 536; Houston & T. C. R. R. *v.* Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80; International & G. N. Ry. *v.* McVey, 99 Tex. Civ. App. 28, 87 S. W. 328 (see International & G. N. Ry. *v.* Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93).

Utah: Webb *v.* Denver & R. G. W. Ry., 7 Utah, 17, 24 Pac. 616, 26 Pac. 981; Corbett *v.* Oregon S. L. R. R., 25 Utah, 449, 71 Pac. 1065.

Washington: Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

Wisconsin: Rudiger *v.* Chicago, S. P. M. & O. Ry., 101 Wis. 292, 77 N. W. 169.

England: Blake *v.* Midland Ry., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233.

Canada: Canadian P. Ry. *v.* Robinson, 14 Can. 105.

Under the statutes of a few States, however, a *solatium* may be recovered.

Louisiana: Parker *v.* Lumber Co., 115 La. 463, 39 So. 445; Bourg *v.* Brownell-Drews Lumber Co., 120 La. 1009, 45 So. 972 (common law).

South Carolina: Nohrden *v.* Northeastern R. R., 59 S. C. 87, 105, 37 S. E. 228; Stuckey *v.* Atlantic Coast L. R. R., 60 S. C. 237, 38 S. E. 416.

Virginia: Baltimore & O. R. R. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Baltimore & O. R. R. *v.* Noell, 32 Gratt. 394; Norfolk & W. R. R. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Portsmouth St. R. R. *v.* Reed, 102 Va. 662, 47 S. E. 850.

West Virginia: Turner *v.* Norfolk & W. R. R., 40 W. Va. 675, 22 S. E. 83; Kelley *v.* Ohio R. R. R., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898.

No recovery can be had for nervous illness of the plaintiff. Norfolk & W. Ry. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

And for negligent or wanton exposure of the dead body by the defendant no compensation can be recovered. Pinson *v.* Southern Ry., 85 S. C. 355, 67 S. E. 464.

[61] *United States:* Hall *v.* Galveston, H. & S. A. Ry., 39 Fed. 18.

Arkansas: Little Rock & F. S. Ry. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

California: Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Pepper *v.* Southern Pac. Co., 105 Cal. 401, 38 Pac. 974; Fox *v.* Oakland C. S. R. R., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Wales *v.* Pacific E. M. Co., 130 Cal. 521, 62 Pac. 932 (explaining and

recover for the loss of his wife's society, [62] nor a wife for that of her husband.[63]

§ 574. Prospective pecuniary loss.

Where there is a prospective pecuniary loss resulting from the death, damages may be recovered in compensation for such loss.[64] It may be difficult, from the nature of the case, to lay

modifying Beeson *v.* Green Mountain G. M. Co., 57 Cal. 20; Cook *v.* Clay St. H. R. R., 60 Cal. 604; Munro *v.* Pacific C. D. & R. R., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248).

Illinois: West Chicago St. R. R. *v.* Dooley, 76 Ill. App. 424; East St. Louis E. S. R. R. *v.* Burns, 77 Ill. App. 529.

Indiana: Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29.

Minnesota: Hutchins *v.* St. Paul, M. & M. Ry., 44 Minn. 5, 46 N. W. 79.

Mississippi: Mobile & O. R. R. *v.* Watly, 69 Miss. 145, 12 So. 558, 13 So. 825.

Nebraska: Kerkow *v.* Bauer, 15 Neb. 150.

New Jersey: Telfer *v.* Northern R. R., 30 N. J. L. 188.

New York: Tilley *v.* New York C. & H. R. R. R., 24 N. Y. 471.

Pennsylvania: Caldwell *v.* Brown, 53 Pa. 453.

Rhode Island: Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

Texas: International & G. N. Ry. *v.* McVey, 99 Tex. Civ. App. 28, 87 S. W. 328.

Vermont: Lazelle *v.* Newfane, 70 Vt. 440, 41 Atl. 511.

England: Blake *v.* Midland Ry., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233, 83 E. C. L. 93; Pym *v.* Great Northern Ry., 4 B. & S. 306.

[62] *Indiana:* Howard Co. *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390.

Kentucky: Eden *v.* Lexington R. R., 14 B. Mon. 204.

Maryland: Baltimore & O. R. R. *v.* State, 63 Md. 135.

Canada: St. Lawrence & O. Ry. *v.* Lett, 11 Can. 422.

Contra, Cregin *v.* Brooklyn C. R. R., 19 Hun, 341.

[63] *United States:* Atchison, T. & S. F. R. R. *v.* Wilson, 48 Fed. 57.

Arkansas: Helena Gas Co. *v.* Rodgers, 135 S. W. 904.

Florida: Florida, C. & P. R. R. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Missouri: Knight *v.* Sadtler, L. & Z. Co., 75 Mo. App. 541.

Pennsylvania: McHugh *v.* Schlosser, 159 Pa. 480, 28 Atl. 291, 39 Am. St. Rep. 669, 23 L. R. A. 574.

Rhode Island: McCabe *v.* Narragansett E. L. Co., 26 R. I. 427, 59 Atl. 112.

Texas: Schaub *v.* Hannibal & St. J. R. R. 16 S. W. 924; Houston & T. C. R. R. *v.* Loeffler (Tex. Civ. App.), 51 S. W. 536.

Wisconsin: Rudiger *v.* Chicago, S. P. M. & O. Ry., 101 Wis. 292, 77 N. W. 169.

Contra in California, as to the widow only: Munro *v.* Pacific C. D. & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

[64] *California:* Keast *v.* Santa Ysabel G. M. Co., 136 Cal. 256, 68 Pac. 771.

Maryland: Balt. & O. R. R. *v.* State, 33 Md. 542.

Mississippi: Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Missouri: Barth *v.* Kansas City El. Ry., 142 Mo. 535, 44 S. W. 778.

down more than a general rule to govern the jury in their award of prospective damages.[65] There should be, at least, a *reasonable expectation* of pecuniary benefit from the life of the deceased to entitle the plaintiff to recover;[66] but the damages are necessarily more or less speculative, and reasonable certainty only can be required.[67] The expectation of benefit need not be based on legal obligation.[68] It is to be based on circumstances showing a probability of such benefit.[69] The amount of compensation for this prospective pecuniary loss rests in the discretion of the jury.[70] In estimating the prospective pecuniary loss through loss of expected accumulations of the deceased, no account can be taken of income from investments

New York: Oldfield *v.* N. Y. & H. R. R., 14 N. Y. 310; O'Mara *v.* Hudson R. R., 38 N. Y. 445; Ihl *v.* 42d St. R. R., 47 N. Y. 317.

Pennsylvania: Pennsylvania R. R. *v.* Adams, 55 Pa. 499.

Texas: March *v.* Walker, 48 Tex. 372.

[66] Chicago & N. W. R. R. *v.* Sweet, 45 Ill. 197.

[66] *United States:* Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619.

Illinois: Chicago & A. R. R. *v.* Kelly, 182 Ill. 267, 272, 54 N. E. 979, 80 Ill. App. 675; Cleveland, C., C. & S. L. Ry. *v.* Keenan, 190 Ill. 217, 60 N. E. 107; Consol. Coal Co. of St. Louis *v.* Stein, 220 Ill. 123, 77 N. E. 133, affirming 122 Ill. App. 310.

Kansas: Atchison, T. & S. F. Ry. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

Maryland: Baltimore & O. R. R. *v.* State, 24 Md. 271; Baltimore & O. R. R. *v.* State, 60 Md. 449.

New Jersey: Graham *v.* Consolidated Tr. Co., 64 N. J. L. 10, 44 Atl. 964.

North Carolina: Kesler *v.* Smith, 66 N. C. 154.

Texas: Fort Worth & D. C. Ry. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677.

Wisconsin: Kaspari *v.* Marsh, 74 Wis. 562; Bauer *v.* Richter, 103 Wis. 412, 79 N. W. 404.

England: Franklin *v.* Southeastern Ry., 3 H. & N. 211; Dalton *v.* Southeastern Ry., 4 C. B. (N. S.) 296.

Reasonable expectation of increased earning capacity may be shown. Central Foundry Co. *v.* Bennett, 144 Ala. 184, 39 So. 574. But not mere speculative chance of promotion. Bonnet *v.* Galveston, H. & S. A. Ry. (Tex.), 33 S. W. 334.

[67] *Ohio:* New York, C. & S. L. Ry. *v.* Roe, 25 Ohio Circ. Ct. 628.

Canada: Rombough *v.* Balch, 27 Ont. App. 32.

[68] *California:* Sneed *v.* Marysville Gas & Electric Co., 149 Cal. 704, 87 Pac. 376.

New York: Carpenter *v.* Buffalo, N. Y. & P. R. R., 38 Hun, 116.

Vermont: Eames *v.* Brattleboro, 54 Vt. 471.

[69] *Nebraska:* Johnson *v.* Missouri P. Ry., 18 Neb. 690.

Wisconsin: Tuteur *v.* Chicago & N. W. R. R., 77 Wis. 505, 46 N. W. 897.

[70] *United States:* St. Louis, I. M. & S. Ry. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129, 3 U. S. App. 339.

Arkansas: Little Rock & F. S. Ry. *v.* Barker, 39 Ark. 491.

Louisiana: Dobyns *v.* Yazoo & M. V. R. R., 119 La. 72, 43 So. 934.

Missouri: Frick *v.* St. Louis, K. C. & N. Ry., 75 Mo. 542.

already made.[71] Nor can the jury consider profits from the business of deceased which in no way depended upon his skill and services.[72]

§ 574a. General rule for damages.

Under the ordinary form of the statute, where damages are restricted to pecuniary compensation for the loss, the amount to be recovered is the amount which would with reasonable probability have been contributed by the deceased either during his lifetime or at his death to the use of the beneficiary,[73] not its gross amount but at its present value,[74] taking into consider-

[71] *New Jersey:* Demarest *v.* Little, 47 N. J. L. 28.

Rhode Island: Underwood *v.* Old Colony St. Ry., 80 Atl. 390.

[72] *New York:* Read *v.* Brooklyn Heights R. R., 32 App. Div. 503, 53 N. Y. Supp. 209.

Utah: Spiking *v.* Consolidated Ry. & P. Co., 13 Utah, 313, 93 Pac. 838.

[73] *Alabama:* Louisville & N. R. R. *v.* Brown, 121 Ala. 221, 25 So. 609.

Colorado: Denver & R. G. R. R. *v.* Woodward, 4 Colo. 1.

Delaware: Reed *v.* Queen Anne's R. R., 4 Pennew. 413, 57 Atl. 529; Wood *v.* Philadelphia, W. & B. R. R., 76 Atl. 613.

Florida: Jacksonville E. Co. *v.* Bowden, 54 Fla. 461, 45 So. 755, 15 L. R. A. (N. S.) 451.

Illinois: Chicago *v.* Keefe, 114 Ill. 222.

Indiana: Lake Erie & W. R. R. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Consolidated Stone Co. *v.* Staggs, 164 Ind. 331, 73 N. E. 695.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29.

Minnesota: Phelps *v.* Winona & S. P. R. R., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Missouri: Jones *v.* Kansas City, F. S. & M. Ry., 178 Mo. 528, 77 S. W. 890.

Montana: Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838.

Pennsylvania: Catawissa R. R. *v.* Armstrong, 52 Pa. 282; Irwin *v.* Pennsylvania R. R., 226 Pa. 156, 75 Atl. 19.

Texas: Louisiana Extension Ry. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Houston Ry. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

Utah: English *v.* Southern Pac. Co., 13 Utah, 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

Wisconsin: Tuteur *v.* Chicago & N. W. R. R., 77 Wis. 505, 46 N. W. 897; Bauer *v.* Richter, 103 Wis. 412, 79 N. W. 404.

No exact mathematical formula can be given. It is not necessarily limited to a sum which would produce an annual income equal to one-half the annual income of decedent, who was husband of plaintiff. Harkins *v.* Pullman P. C. Co., 52 Fed. 724.

[74] *United States:* Florida, C. & P. R. R. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410.

Alabama: McAdory *v.* Louisville & N. R. R., 94 Ala. 272, 10 So. 507; Alabama Mineral R. R. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Decatur Car Wheel Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

Arkansas: St. Louis, I. M. & S. Ry. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; Kansas City S. Ry. *v.* Hewie, 87 Ark. 443, 112 S. W. 967.

Iowa: Andrews *v.* Chicago, etc., R. R., 86 Iowa, 677, 686, 53 N. W. 399.

ation the age and expectation of life of the deceased, his ability and disposition to labor, his capacity to earn, and his habits of spending and saving.[75] This is sometimes stated as his prob-

Mississippi: Mississippi C. O. Co. *v.* Smith, 48 So. 735.

New Jersey: Hackney *v.* Delaware & A. T. & C. Co., 69 N. J. L. 335, 55 Atl. 252.

North Carolina: Pickett *v.* Wilmington & W. R. R., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257.

Pennsylvania: Burns *v.* Pennsylvania R. R., 219 Pa. 225, 68 Atl. 704; Irwin *v.* Pennsylvania R. R., 226 Pa. 156, 75 Atl. 19.

Rhode Island: McCabe *v.* Narragansett E. L. Co., 26 R. I. 427, 59 Atl. 112.

Texas: San Antonio T. Co. *v.* White, 94 Tex. 468, 61 S. W. 706; Fort Worth & D. C. Ry. *v.* Morrison (Tex. Civ. App.), 56 S. W. 931; R. R. *v.* Linthicum, 33 Tex. Civ. App. 375, 77 S. W. 40; San Antonio & A. P. Ry. *v.* Brock, 35 Tex. Civ. App. 155, 80 S. W. 422; St. Louis S. W. Ry. *v.* Shiflet (Tex. Civ. App.), 81 S. W. 524.

Utah: Evans *v.* Oregon Short Line R. R., —— Utah, ——, 108 Pac. 638.

England: Grand Trunk Ry. *v.* Jennings, 13 App. Cas. 800.

Such sum, as being put to interest, by taking part of the principal and adding it to the interest yields the amount of the deceased's yearly contribution to his family less his personal expenses; so that the whole remaining principal at the end of his expectancy of life added to the interest on this balance for that year will equal the amount of his yearly contribution to his family, less his personal expenses. Reiter-Conley Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 So. 280.

A sum not larger than would be exhausted at the end of deceased's expectancy by expending each year a sum equal to his net earnings. Atlantic & W. P. Ry. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

Such sum as placed at legal interest for time of deceased's expectancy of life would produce the amount he would have accumulated over and above his liabilities at his death, had he lived out his expectancy. Lowe *v.* Chicago, B. & Q. R. R., 89 Ia. 420, 56 N. W. 519.

Such a sum as being put to interest, will each year, by taking part of the principal and adding to the interest, yield an amount sufficient for her support during the time deceased would probably have lived, together with such other sum as the evidence showed there was reasonable expectation she would receive from his earnings. Rudiger *v.* Chicago, S. P., M. & O. Ry., 101 Wis. 292, 77 N. W. 169.

[75] *United States:* Kelley *v.* Central R. R., 5 McCr. 653; Southern Pac. Co. *v.* Lafferty, 57 Fed. 536; Northern Pac. R. R. *v.* Freeman, 83 Fed. 82, 27 C. C. A. 457; Florida C. & P. R. R. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410.

Alabama: Tutwiler C. C. & I. Co. *v.* Enslen, 129 Ala. 336, 30 So. 600; McGhee *v.* Willis, 134 Ala. 281, 32 So. 301; Woodstock Iron Works *v.* Kline, 144 Ala. 391, 43 So. 362.

Arkansas: St. Louis, I. M. & S. Ry. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California: Taylor *v.* West P. R. R., 45 Cal. 323.

Colorado: Kansas Pac. R. R. *v.* Lundin, 3 Colo. 94; Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

Connecticut: Howey *v.* New England Nav. Co., 83 Conn. 278, 76 Atl. 469.

Delaware: Neal *v.* Wilmington R. R., 3 Pennew. 467, 53 Atl. 338; MacFeat *v.* Philadelphia, W. & B. R. R., 5 Pennew. 52, 62 Atl. 898; Lenkewicz *v.* Wilmington City Ry., 74 Atl. 11.

able earnings during his life, less what he would have devoted or what would have been devoted to his personal use.[76] The

Florida: Jacksonville Electric Co. *v.* Bowden, 54 Fla. 461, 45 So. 755.

Georgia: Macon & Western R. R. *v.* Johnson, 38 Ga. 409.

Hawaii: Kake *v.* Horton, 2 Hawaii, 209.

Indiana: Ohio & M. Ry. *v.* Voight, 122 Ind. 288, 23 N. E. 774.

Iowa: Wheelan *v.* Chicago, M. & S. P. Ry., 85 Ia. 167, 52 N. W. 119; Lowe *v.* Chicago, S. P. M. & O. Ry., 89 Ia. 420, 56 N. W. 519.

Maine: Welch *v.* Maine Cent. R. R., 86 Me. 552, 570, 30 Atl. 116.

Maryland: Baltimore & R. T. *v.* State, 71 Md. 573.

Minnesota: Shaber *v.* St. Paul, M. & M. Ry., 28 Minn. 103, 9 N. W. 575; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575.

Missouri: Chambers *v.* Kupper-Benson Hotel Co., 154 Mo. App. 249, 134 S. W. 45.

New York: Etherington *v.* Prospect P. & C. I. R. R., 88 N. Y. 641; De Luna *v.* Union Ry., 130 App. Div. 386, 114 N. Y. Supp. 893.

North Carolina: Burton *v.* Wilmington & W. R. R., 82 N. C. 504.

Oregon: Skottowe *v.* Oregon Short Line Ry., 22 Ore. 430, 451, 30 Pac. 222, 16 L. R. A. 593.

Pennsylvania: Catawissa R. R. *v.* Armstrong, 52 Pa. 282; Mansfield Coal Co. *v.* McEnery, 91 Pa. 185, 36 Am. Rep. 662; McHugh *v.* Schlosser, 159 Pa. 480, 28 Atl. 291, 39 Am. St. Rep. 669, 23 L. R. A. 574.

Rhode Island: Reynolds *v.* Narragansett E. L. Co., 26 R. I. 457, 59 Atl. 393.

Tennessee: Louisville & N. R. R. *v.* Stacker, 86 Tenn. 343, 353.

Texas: International & G. N. Ry. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Utah: Pool *v.* Southern Pac. R. R., 7 Utah, 303, 26 Pac. 654.

Virginia: Norfolk & W. Ry. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Wisconsin: Castello *v.* Landwehr, 28 Wis. 522.

"What the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure." Pennsylvania R. R. *v.* Butler, 57 Pa. 335, 358.

"The jury is not confined to any procrustean rule in measuring the value of a life. Age, health, habits, the money he is making, are all data from which the jury may argue his length of life and ability to work, and thus what that life is worth to his wife." Central R. R. *v.* Thompson, 76 Ga. 770, 782. "The probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed." Baltimore & O. R. R. *v.* Wightman, 29 Gratt. (Va.) 431, 443, 26 Am. Rep. 384.

[76] *California:* Harrison *v.* Sutter St. R. R., 116 Cal. 156, 47 Pac. 1079.

Colorado: Denver & R. G. R. R. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

Delaware: Short *v.* Philadelphia, B. & W. R. R., 76 Atl. 363.

North Carolina: Pickett *v.* Wilmington & W. R. R., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; Russell *v.* Windsor S. B. Co., 126 N. C. 961, 36 S. E. 191.

Pennsylvania: Peters *v.* Bessemer & L. E. R. R., 225 Pa. 307, 74 Atl. 61.

circumstances of the plaintiff must also be considered, as his age and expectation of life during which he might receive benefits from the deceased, his need of assistance, and any other circumstances which might indicate what he would receive.[77]

These general rules may of course be modified by reason of some peculiarity in the statute. Thus in Kentucky the loss to the estate by the destruction of the earning power of the deceased is the only thing to be considered.[78]

§ 575. Services of a child.

A parent may recover the value of the services of a minor child during the minority.[79] But it should be made to appear

[77] *Indiana:* Louisville, N. A. & C. Ry. *v.* Wright, 134 Ind. 509, 34 N. E. 314.

Michigan: Richmond *v.* Chicago & W. M. Ry., 87 Mich. 374, 49 N. W. 621.

Missouri: Chambers *v.* Kupper-Benson Hotel Co., 154 Mo. App. 249, 134 S. W. 45.

[78] Louisville & N. R. R. *v.* Morris, 14 Ky. L. Rep. 466, 20 S. W. 539; Louisville & N. R. R. *v.* Berry, 96 Ky. 604, 29 S. W. 449; Chesapeake & O. Ry. *v.* Lang, 100 Ky. 221, 40 S. W. 451, 41 S. W. 271; Louisville & N. R. R. *v.* Kelly, 100 Ky. 421, 40 S. W. 452; Louisville & N. R. R. *v.* Milet, 20 Ky. L. Rep. 532, 46 S. W. 498; Louisville & N. R. R. *v.* Taafe, 21 Ky. L. Rep. 64, 50 S. W. 850; Southern Ry. *v.* Evans, 63 S. W. 445, 23 Ky. L. Rep. 568; Louisville & N. R. R. *v.* Sullivan, 76 S. W. 525, 25 Ky. L. Rep. 854; Big Hill Coal Co. *v.* Abney, 125 Ky. 355, 101 S. W. 394, 30 Ky. L. Rep. 1304. Therefore his family circumstances are not admissible. Louisville & N. R. R. *v.* Eakin's Adm'r, 103 Ky. 465, 479, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, 20 Ky. L. Rep. 933.

[79] *Arkansas:* Little Rock & F. S. Ry. *v.* Barker, 33 Ark. 350, 34 Am. Rep. 44.

California: Cleary *v.* City R. R., 76 Cal. 240, 18 Pac. 269; Fox *v.* Oakland C. S. R. R., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Delaware: Baldwin *v.* People's Ry., 76 Atl. 1088.

Georgia: Augusta Factory *v.* Davis, 87 Ga. 648, 13 S. E. 577; Southern R. R. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253.

Illinois: Rockford, R. I. & S. L. R. R. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Illinois C. R. R. *v.* Slater, 129 Ill. 91, 21 N. E. 575.

Indiana: Louisville, N. A. & C. Ry. *v.* Rush, 127 Ind. 545, 26 N. E. 1010; Cleveland, C., C. & St. L. R. R. *v.* Miles, 162 Ind. 646, 70 N. E. 985; Southern I. Ry. *v.* Moore, 34 Ind. App. 154, 72 N. E. 479, 71 N. E. 516; City of Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

Iowa: Hopkinson *v.* Knapp & Spaulding Co., 92 Ia. 328, 60 N. W. 653; Benton *v.* Chicago, R. I. & P. Ry., 55 Ia. 496, 8 N. W. 330.

Kansas: Union Pac. R. R. *v.* Dunden, 37 Kan. 1, 14 Pac. 501.

Kentucky: Covington St. R. R. *v.* Packer, 9 Bush, 455, 15 Am. Rep. 725.

Maryland: Agricultural & M. Assoc. *v.* State, 71 Md. 86.

Michigan: Hurst *v.* Detroit City Ry., 84 Mich. 539, 48 N. W. 44.

Minnesota: Robel *v.* Chicago, M. & St. P. Ry., 35 Minn. 84, 27 N. W. 305.

Missouri: Rains *v.* St. Louis, I. M. & S. Ry., 71 Mo. 164, 36 Am. Rep. 459;

to the jury that there is at least a *reasonable* expectation that the services of the child will be of pecuniary value to the plaintiff;[80] and the complaint should allege that the father has suf-

Barnes *v.* Columbia Lead Co., 107 Mo. App. 608, 82 S. W. 203.

New York: Oldfield *v.* New York & H. R. R., 14 N. Y. 310; O'Mara *v.* Hudson R. R. R., 38 N. Y. 445; Ihl *v.* 42d St. R. R., 47 N. Y. 317; Gill *v.* Rochester & P. R. R., 37 Hun, 107; Schaffer *v.* Baker Transfer Co., 29 App. Div. 459, 51 N. Y. Supp. 1092.

Pennsylvania: Pennsylvania R. R. *v.* Zebe, 33 Pa. 318; Pennsylvania R. R. *v.* Bantom, 54 Pa. 495.

Texas: Cole *v.* Parker, 27 Tex. Civ. App. 563, 66 S. W. 135; Freeman *v.* Carter, 28 Tex. Civ. App. 571, 67 S. W. 527; Galveston, H. & N. Ry. *v.* Olds, 112 S. W. 787.

Utah: Corbett *v.* Oregon Short Line R. R., 25 Utah, 449, 71 Pac. 1065.

Wisconsin: Ewen *v.* Chicago & N. W. Ry., 38 Wis. 613; Luessen *v.* Oshkosh E. L. & P. Co., 109 Wis. 94, 85 N. W. 124.

England: Duckworth *v.* Johnson, 4 H. & N. 653.

Ireland: Condon *v.* Great Southern R. R., 16 Ir. Com. L. 415.

In Louisiana a different rule prevails. The parent can recover only for his personal loss, the pecuniary loss to the child's estate being recoverable in another suit. Bourg *v.* Brownell-Drews Lumber Co., 120 La. 1009, 45 So. 972. In some States, notably in Kentucky, the damages must be recovered for the estate of the deceased child through loss to his earning power; and his earnings during minority, not enuring to the benefit of his estate, are not considered. Lines *v.* Chesapeake & O. Ry., 91 Fed. 964; Louisville & N. R. R. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691.

So in *Iowa:* Lawrence *v.* Birney, 40 Iowa, 377.

But *contra* in *Illinois:* Illinois Cent. R. R. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 15 Am. St. Rep. 242, 6 L. R. A. 418.

In Telfer *v.* Northern R. R., 30 N. J. L. 188, 209, Van Dyke, J., said: "It is simply an action to recover, in dollars and cents, a compensation for the loss and damages which have actually been sustained. As the father of his children, the plaintiff was entitled to their services until they should arrive at the age of twenty-one years; and what those services might reasonably have been expected to be worth, he was entitled to recover, and nothing more, unless it be expenses growing out of the injuries, subject to the burdens and encumbrances which that relationship imposed upon him."

The cases of Ihl *v.* 42d St. R. R., 47 N. Y. 317; Oldfield *v.* New York & H. R. R., 14 N. Y. 310, and O'Mara *v.* Hudson R. R. R., 38 N. Y. 445, which are sometimes quoted as authorities for the position that the statute does not limit the recovery to the actual pecuniary loss proved on the trial, can only be regarded as correctly decided if the word *actual* is used as synonymous with the word *present;* and this would seem to be the case from the language used by Wright, J., in Oldfield *v.* The N. Y. & H. R. R. R. Yet in Gorham *v.* New York C. & H. R. R. R., 23 Hun (N. Y.), 449, the court said:

"It was held in an action to recover damages for death of a child, three years old, under provision of chap. 450, L. 1847, as amended by chap. 256, L. 1849, that absence of proof of special pecuniary damage resulting from death of the child will not justify the court in nonsuiting the plaintiff or in directing the jury to find only nominal damages."

[80] *Kansas:* Atchison, T. & S. F. R. R. *v.* Brown, 26 Kan. 443.

fered damage by the loss of service, or has been put to expense.[81] Since the jury must be satisfied by proof of the *probability* of actual loss resulting to the plaintiff from the death of the minor, the condition of the parents, the occupation of the father, etc., are admissible in evidence in this class of cases, when not in others under the statute, to enable the jury to determine the actual loss which will, in all probability, result from the death of the child.[82] The expense of providing for the child, had he lived, should be estimated and deducted from the estimated earnings of the child.[83] These elements are necessarily uncertain, and any verdict must to a considerable extent be based on speculation; but the jury may nevertheless in the exercise of its best judgment find substantial damages to have been suffered by the parent.[84] If the advice of the minor was valuable, compensation may be recovered for the loss of it.[85]

North Dakota: Scherer *v.* Schlaberg, 18 N. D. 421, 122 N. W. 1000, 24 L. R. A. (N. S.) 520.

Wisconsin: Potter *v.* Chicago & N. W. Ry., 21 Wis. 372, 94 Am. Dec. 548.

[81] Edgar *v.* Castello, 14 S. C. 20.

[82] *United States:* Barley *v.* Chicago & A. R. R., 2 Fed. Cas. No. 997, 4 Biss. 430.

Georgia: Crawford *v.* Southern R. R., 106 Ga. 870, 33 S. E. 826.

Illinois: Chicago *v.* Powers, 42 Ill. 169; Chicago City Ry. *v.* Riddick, 139 Ill. App. 160.

New York: Roger *v.* Rochester R. R., 2 App. Div. 5, 37 N. Y. Supp. 520.

Texas: Galveston, H. & S. A. Ry. *v.* Pigott (Tex. Civ. App.), 116 S. W. 841.

Washington: Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620.

Wisconsin: Ewen *v.* Chicago & N. W. Ry., 38 Wis. 613; Luessen *v.* Oshkosh, E. L. & P. Co., 109 Wis. 94, 85 N. W. 124.

[83] *Arkansas:* St. Louis, I. M. & S. Ry. *v.* Freeman, 36 Ark. 41.

California: Fox *v.* Oakland C. S. R. R., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Illinois: Rockford, R. I. & S. L. R. R. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308.

Indiana: Cleveland, C. C. & S. L. R. R. *v.* Miles, 162 Ind. 646, 70 N. E. 985; Elwood *v.* Addison, 26 Ind. App. 28, 35, 59 N. E. 47; Southern I. Ry. *v.* Moore, 34 Ind. App. 154, 70 N. E. 479, 71 N. E. 516.

Iowa: Hopkinson *v.* Knapp & Spaulding Co., 92 Ia. 328, 60 N. W. 653.

Michigan: Hurst *v.* Detroit City Ry., 84 Mich. 539, 48 N. W. 44.

Missouri: Barnes *v.* Columbia Lead Co., 107 Mo. App. 608, 82 S. W. 203.

New York: Schaffer *v.* Baker Transfer Co., 29 App. Div. 459, 51 N. Y. Supp. 1092.

Texas: Cole *v.* Parker, 27 Tex. Civ. App. 563, 66 S. W. 135; Freeman *v.* Carter, 28 Tex. Civ. App. 571, 67 S. W. 527.

[84] *New York:* Howell *v.* Rochester Ry., 24 App. Div. 502, 49 N. Y. Supp. 17.

Rhode Island: Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

[85] Gill *v.* Rochester & P. R. R., 37 Hun (N. Y.), 107.

The fact that the father of a deceased minor prior to the accident had relinquished to him the right to his time and services is not a bar to the action,[86] but may be taken into account in reduction.[87]

The weight of authority is that the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life beyond the minority.[88] Thus Earl, J., said in Birkett *v.* Knickerbocker Ice Co.:[89]

[86] *United States:* Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619.

Maryland: Agricultural & M. Assoc. *v.* State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507.

Wisconsin: Luessen *v.* Oshkosh E. L. & P. Co., 109 Wis. 94, 85 N. W. 124.

[87] *Illinois:* Quincy Coal Co. *v.* Hood, 77 Ill. 68.

Kansas: St. Joseph & W. R. R. *v.* Wheeler, 35 Kan. 185, 10 Pac. 461.

But a mother may recover for the value of her son's services lost to her though he intended to go back to school. His services and learning are one of the things that a parent has a right to. Clark *v.* Tulare L. D. Co., 11 Cal. App. 481, 112 Pac. 564.

[88] *United States:* Texas & P. Ry. *v.* Wilder, 92 Fed. 953, 35 C. C. A. 105 (and see the dissenting opinion for the proper limits of the doctrine); Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474, 15 U. S. App. 193.

Arkansas: Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

California: Munro *v.* Pacific C. D. & R. R., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Quill *v.* Southern Pac. Ry., 140 Cal. 268, 73 Pac. 991; Bond *v.* United Railroads, 113 Pac. 366.

Illinois: Baltimore & O. S. W. Ry. *v.* Then, 159 Ill. 535, 42 N. E. 971; Chicago, etc., R. R. *v.* Beaver, 199 Ill. 34, 65 N. E. 144; United States Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081, 133 Ill. App. 435; McLean County Coal Co. *v.* McVey, 38 Ill. App. 158.

Indiana: Southern I. R. R. *v.* Moore, 34 Ind. App. 154, 72 N. E. 479.

Kansas: St. Joseph & W. R. R. *v.* Wheeler, 35 Kan. 185, 10 Pac. 461; Atchison, etc., R. R. *v.* Cross, 58 Kan. 424, 49 Pac. 59.

Minnesota: Scheffler *v.* Minneapolis & St. L. Ry., 32 Minn. 518, 21 N. W. 711; Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694.

Nebraska: Draper *v.* Tucker, 69 Neb. 434, 95 N. W. 1026.

New York: Birkett *v.* Knickerbocker Ice Co., 100 N. Y. 504, 18 N. E. 108.

Texas: Houston & T. C. Ry. *v.* Cowser, 57 Tex. 293; Galveston, H. & S. A. Ry. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301; Cole *v.* Parker, 27 Tex. Civ. App. 563, 66 S. W. 135; Freeman *v.* Carter, 28 Tex. Civ. App. 571, 67 S. W. 527; Texas, etc., R. R. *v.* Harby, 28 Tex. Civ. App. 24, 67 S. W. 541; San Antonio St. Ry. *v.* Mechler (Tex. Civ. App.), 29 S. W. 202; Galveston, H. & N. Ry. *v.* Olds, (Tex. Civ. App.), 112 S. W. 787.

Utah: Beaman *v.* Martha Washington Min. Co., 23 Utah, 139, 63 Pac. 631.

Wisconsin: Potter *v.* Chicago & N. W. R. R., 21 Wis. 372, 94 Am. Dec. 548; Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

Such damages cannot extend beyond the lifetime of the parents. Fidelity

[89] 110 N. Y. 504, 508, 18 N. E. 108.

"The jury were not bound, in estimating the compensation to be made for the death of the child, to confine their considerations to her minority. It is true that the plaintiff, as father, could command her services only during her minority. But in certain circumstances she might, after her majority, owe him the duty of support, which could, by legal proceedings, be enforced; and after that event she might, in many ways, be of great pecuniary benefit to him. In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable, or even possible, benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. There is no rule but their own good sense for their guidance, and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority."

In some jurisdictions, however, nothing can be recovered on account of loss of services after majority where the child was a minor when he died.[90] "The chances of survivorship, his ability and willingness to support her, are matters too vague to enter into an estimate of damages merely compensatory."[91] In Cooper *v.* Lake Shore & M. S. Ry.[92] the court said:

"Here was a broad field of chance and probabilities laid open before the jury through which they could roam without limit. They were permitted to speculate upon the future, and consider the probabilities or the possibilities of its unknown and unknowable contingencies; to consider and guess at what might

L. & I. Co. *v.* Buzzard, 69 Kan. 330, 76 Pac. 832. And so where the statute provides that the action shall be in favor of "the estate of the deceased," it is held that damages are not limited to the minority of the child. Pennsylvania R. R. *v.* Lilly, 73 Ind. 252; Walters *v.* Chicago, R. I. & P. R. R., 36 Ia. 458, 41 Ia. 71.

[90] *United States:* Deninger *v.* American Locomotive Co., 185 Fed. 22, (Pennsylvania statute).

Maryland: State *v.* Baltimore & O. R. R., 24 Md. 84, 87 Am. Dec. 600; Agricultural & M. Assoc. *v.* State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507.

Michigan: Cooper *v.* Lake Shore & M. S. Ry., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

New Jersey: Telfer *v.* Northern R. R., 30 N. J. L. 188.

Pennsylvania: Pennsylvania R. R. *v.* Kelly, 31 Pa. 372; Pennsylvania R. R. *v.* Zebe, 33 Pa. 318; Caldwell *v.* Brown, 53 Pa. 453; Lehigh Iron Co. *v.* Rupp, 100 Pa. 95.

[91] State *v.* Baltimore & O. R. R., 24 Md. 84, 107, 87 Am. Dec. 600.

[92] 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482, per Champlin, J.

occur had the daughter not been killed, and had lived to an age measured by the probable duration of the life of a person 11 years of age. They were given the *data* of a healthy girl of 11 years of age, born of poor parents, living with and being cared for by her grandmother; and from this they were required to solve the mighty problem of a life whose future was unknown, and from its unfathomable depths to figure out the chances of pecuniary benefits the parents of that child would have received had she lived past the age of majority."

§ 576. Loss of an adult child.

In case of the killing of an adult child who is at the time actually rendering services, recovery may be had even in all jurisdictions.[93] So a parent may recover for loss of the advice of his adult son in pecuniary matters, if the probability of such loss is shown,[94] and for loss of the attentions and kindness of the child, adding as they do to the ease and physical comfort of the parent's life.[95] In Houston & Texas Central Railway *v.* Cowser,[96] it is suggested that the best measure of damages would, perhaps, be such a sum as would produce an annuity equal to the value of the pecuniary aid that the plaintiff would have derived from his deceased son, calculated on the basis of all accessible facts, including probable duration of life. But the amount of recovery is not necessarily restricted to such a sum,[97] but extends to the actual loss caused by the termination of the domestic relations.[98]

A reasonable probability of pecuniary advantage from the continuance of the life must be shown;[99] if it is shown the parent

[93] *California:* Hildebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163.

Maryland: Agricultural & M. Assoc. *v.* State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507.

Texas: Missouri Pac. Ry. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

[94] *Pennsylvania:* North Pennsylvania R. R. *v.* Kirk, 90 Pa. 15.

Texas: Missouri Pac. Ry. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

[95] *California:* Hildebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29.

[96] 57 Tex. 293.

[97] *New Jersey:* Jackson *v.* Consolidated Tr. Co., 59 N. J. L. 25, 35 Atl. 754.

Texas: International & G. N. R. R. *v.* Kindred, 57 Tex. 491.

[98] Rogers *v.* Rio Grande Western Ry., 90 Pac. 1075, 32 Utah, 367.

[99] *United States:* Scofield *v.* Pennsylvania Co., 149 Fed. 601.

Arkansas: St. Louis, M. & S. E. R. R. *v.* Garner, 76 Ark. 555, 89 S. W. 550.

may recover; if not, there can be no recovery.[100] So where at and before the time of his death the deceased was not contributing to the parent's support there can be no recovery.[101] The expectation of life of the deceased is ordinarily immaterial, since that of the parent is less, and the loss cannot extend beyond the parent's lifetime.[102] But all circumstances bearing on the amount of loss are to be shown and considered.[103]

§ 577. Care and services of a parent.

The case of the death of the parents, where the death occasions actual pecuniary loss to the child, present or prospective, falls within the class of cases already considered; and a minor may recover for loss of support during minority.[104] Where there is no present pecuniary loss, but where the services of the parent are such as to place the children in a better position in life, damages may be recovered under the rule as laid down in Tilley *v.* Hudson River Railroad.[105] Thus the probable earnings of the parent which would have enured to the benefit of the child may be recovered; [106] and he may also be compensated

Texas: Winnt *v.* International G. N. Ry., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172; Galveston, H. & S. A. Ry. *v.* Power (Tex. Civ. App.), 54 S. W. 629.

[100] *Illinois:* Huff *v.* Peoria & E. Ry., 127 Ill. App. 242.

Kansas: Cherokee & P. C. & M. Co., *v.* Limb, 47 Kan. 469, 28 Pac. 181.

Nebraska: Greenwood *v.* King, 82 Neb. 11, 116 N. W. 1128.

[101] *Georgia:* Smith *v.* Hatcher, 102 Ga. 158, 29 S. E. 162 (deceased in prison at time of death).

Texas: Light, etc., Co. *v.* Munsey, 33 Tex. Civ. App. 416, 76 S. W. 931 (deceased married and not contributing).

But where the child had agreed to make a loan to the parent, this may be shown. Mollie Gibson C. M. & M. Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850.

[102] Ill. Cent. R. R. *v.* Crudup, 63 Miss. 291.

[103] *Colorado:* Colorado C. & I. Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251.

Indiana: Chicago & E. I. R. R. *v.* Vestor, 93 N. E. 1039.

[104] *California:* Simoneau *v.* Pac. E. Ry., 115 Pac. 320.

Georgia: Atlanta & W. P. R. R. *v.* Venable, 67 Ga. 697.

Maryland: Baltimore & R. T. *v.* State, 71 Md. 573.

Missouri: McPherson *v.* St. Louis, I. M. & S. Ry., 97 Mo. 253, 10 S. W. 846.

Texas: International & G. N. Ry. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; International & G. N. Ry. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

[105] 24 N. Y. 471.

[106] *Missouri:* Jones *v.* Kansas City, F. S. & M. Ry., 178 Mo. 528, 77 S. W. 890.

Vermont: Lazelle *v.* Newfane, 70 Vt. 440, 41 Atl. 511. But see Wiest *v.* Electric Tr. Co., 202 Pa. 1, 49 Atl. 891.

for the value of the parent's services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death,[107] for as was said in Howard Co. *v.* Legg: [108] "The care, training, and education which a father can give his children may justly be regarded as increasing their capacity to make their way in the world, and this capacity, surely, may be valuable even in a pecuniary sense." But a child can recover for the loss of such advice only as would have had pecuniary value, in estimating

[107] *United States:* Duke *v.* St. Louis & S. F. R. R., 172 Fed. 684.

Arkansas: St. Louis, I. M. & S. Ry. *v.* Maddry, 57 Ark. 306, 21 S. E. 472; St. Louis, I. M. & S. Ry. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; St. Louis, I. M. & S. Ry. *v.* Haist, 71 Ark. 258, 72 S. W. 893; St. Louis, I. M. & S. Ry. *v.* Hitt, 76 Ark. 227, 88 S. W. 908; St. Louis & N. A. R. R. *v.* Mathis, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85; St. Louis, I. M. & S. Ry. *v.* Standifer, 81 Ark. 275, 99 S. W. 81.

California: Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Johnson *v.* Southern Pac. R. R., 154 Cal. 285, 97 Pac. 520; Valenti *v.* Sierra Ry., 111 Pac. 95; Simoneau *v.* Pac. E. Ry., 115 Pac. 320.

Idaho: Anderson *v.* Great No. Ry., 15 Ida. 513, 99 Pac. 91.

Illinois: Anthony Ittner Brick Co. *v.* Ashby, 198 Ill. 562, 64 N. E. 110; Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805, affirming 123 Ill. App. 108; Baltimore & O. R. R. *v.* Stanley, 54 Ill. App. 215.

Indiana: Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Missouri: Stoher *v.* St. Louis, I. M. & S. Ry., 91 Mo. 509, 4 S. W. 389.

New York: Tilley *v.* Hudson R. R. R., 29 N. Y. 252, 86 Am. Dec. 297; Sternfels *v.* Metropolitan St. Ry., 73 App. Div. 494, 77 N. Y. Supp. 309.

Pennsylvania: Mansfield Coal & Coke Co. *v.* McEnery, 91 Pa. 185.

Texas: International & G. N. Ry. *v.* McVey, 99 Tex. 28, 87 S. W. 328; Chicago, R. I. & T. Ry. *v.* Porterfield, 19 Tex. Civ. App. 225, 46 S. W. 919; Houston & T. C. R. R. *v.* Rutland, 45 Tex. Civ. App. 621, 101 S. W. 529; Gray *v.* Phillips, 117 S. W. 870, (Tex. Civ. App.).

Utah: Wells *v.* Denver & R. G. W. Ry., 7 Utah, 482, 27 Pac. 688; Chilton *v.* Union Pac. Ry., 8 Utah, 47, 29 Pac. 963.

Virginia: Baltimore & O. R. R. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Norfolk & W. Ry. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Vermont: Hoadley *v.* International Paper Co., 72 Vt. 79, 84, 47 Atl. 169.

West Virginia: Searle *v.* Kanawha & O. Ry., 32 W. Va. 370, 9 S. E. 248.

Washington: Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

Wisconsin: Castello *v.* Landwehr, 28 Wis. 522.

Canada: St. Lawrence & O. Ry. *v.* Lett, 11 Can. 422.

Contra, Michigan: Walker *v.* Lake Shore & M. S. Ry., 111 Mich. 518, 69 N. W. 1114.

North Carolina: Bradley *v.* Ohio River R. R., 122 N. C. 972, 30 S. E. 8.

Of course, nothing can be recovered on this account in a State where the measure of damages is the loss to the estate of the deceased. McCabe *v.* Narragansett E. L. Co., 27 R. I. 272, 61 Atl. 667.

[108] 93 Ind. 523, 530, 47 Am. Rep. 390.

which the age and situation of the parties is to be considered,[109] and nothing can be included for the merely sentimental loss; [110] and where there is no proof that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical, or intellectual training, it has been said that it is erroneous to allow the jury to consider the loss of instruction and moral training by the children.[111] Since the father is bound to support a minor child, it is not material whether he has or has not done so in fact.[112]

The recovery is not confined to losses suffered during minority; a child may recover for probable pecuniary loss after he reaches his majority.[113] So a married adult daughter with whom the deceased mother lived may recover the value of the services which the deceased was in the habit of performing.[114] But to justify recovery in such a case, evidence must be given to show that there was in fact a reasonable expectation of pecuniary benefit.[115]

§ 578. Services of a wife or husband.

A husband may recover the net value to him of the services of his deceased wife, though he can recover nothing for the loss of her companionship,[116] and the amount is to be found by

[109] Demarest *v.* Little, 47 N. J. L. 28.

[110] *United States:* Felt *v.* Puget S. E. Ry., 175 Fed. 477.

Texas: Gulf, C. & S. F. Ry. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

[111] Illinois C. R. R. *v.* Weldon, 52 Ill. 290; Chicago, R. I. & P. R. R. *v.* Austin, 69 Ill. 426. It would seem that proof of such unfitness should come from the defendant; but see St. Louis & S. F. Ry. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

[112] International & G. N. Ry. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

[113] *United States:* Butte Electric Ry. *v.* Jones, 164 Fed. 308.

Arkansas: Kansas City S. Ry. *v.* Frost, 93 Ark. 183, 124 S. W. 748.

California: Redfield *v.* Oakland C. S. R. R., 110 Cal. 277, 42 Pac. 822; Peters *v.* Southern Pac. Co., 116 Pac. 400.

Texas: Tyler S. E. Ry. *v.* Rasberry, 13 Tex. Civ. App. 185, 34 S. W. 794; Paris & G. N. Ry. *v.* Robinson (Tex.), 127 S. W. 294.

Contra, Michigan: Rouse *v.* Detroit Electric Ry., 128 Mich. 149, 87 N. W. 68.

[114] Baltimore & O. R. R. *v.* State, 63 Md. 135; *acc.*, Omaha Water Co. *v.* Schamel, 147 Fed. 502, 78 C. C. A. 68.

[115] *District of Columbia:* Baltimore & O. R. R. *v.* Golway, 6 D. C. App. Cas. 143, 178.

Pennsylvania: Schnatz *v.* Phila. & R. R. R., 160 Pa. 602, 28 Atl. 952.

Texas: International & G. N. R. R. *v.* Bajligethy, 9 Tex. Civ. App. 108, 28 S. W. 829; San Antonio & A. P. Ry. *v.* Long, 19 Tex. Civ. App. 649, 48 S. W. 599.

[116] *California:* Green *v.* Southern C. Ry., 132 Cal. 254, 67 Pac. 4.

taking the excess of the value of the services over the cost of suitably maintaining her.[117] It has been held that it is incumbent upon the husband to prove that the wife's services actually had a value, and what the value was;[118] but it has been sensibly remarked that it is not necessary for him to prove that she possessed any special or exceptionally good qualities, as with propriety he might have done if the subject of his loss had been a horse or a cow.[119]

A widow may recover compensation for loss of support of her deceased husband.[120] She may recover for loss of support though separated from her husband at the time of his death. He still owed her his support; and an inquiry into the question whether he meant to support her is irrelevant.[121] Not only the amount that she would have received from year to year, but his probable accumulations during his life may be considered,[122] By the better view she may recover compensation for the loss of the care and counsel of her husband, so far as it had an actual pecuniary value,[123] though not for her grief at his loss, or for the

Canada: St. Lawrence & O. Ry. *v.* Lett, 11 Can. 422.

[117] *Colorado:* Denver & R. G. Ry. *v.* Gunning, 33 Colo. 280, 80 Pac. 727.

Michigan: Gorton *v.* Harmon, 116 N. W. 443, 15 Detroit Leg. N. 250, 152 Mich. 473.

Texas: Gulf, C. & S. F. Ry. *v.* Southwick (Tex. Civ. App.), 30 S. W. 592.

[118] Nelson *v.* Lake Shore & M. S. Ry., 104 Mich. 582, 62 N. W. 993. In Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838, it was permitted the defendant to show that the husband had been in better condition since the death of his wife than before, as bearing on the amount of his loss.

[119] Delaware, L. & W. R. R. *v.* Jones, 128 Pa. 308, 18 Atl. 330.

[120] *Delaware:* Cox *v.* Wilmington City Ry., 4 Pennew. 162, 53 Atl. 569.

Maryland: Baltimore & R. T. *v.* State, 71 Md. 573.

Michigan: Rouse *v.* Detroit Electric Ry., 128 Mich. 149, 87 N. W. 68.

Missouri: Nichols *v.* Winfrey, 90 Mo. 403, 2 S. W. 305.

Wisconsin: Keeley *v.* Great No. Ry., 139 Wis. 448, 121 N. W. 167.

The fact that the widow was left with children dependent upon her for support would be considered. Abbot *v.* McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910.

[121] *Delaware:* Wood *v.* Philadelphia, B. & W. R. R., 76 Atl. 613.

Georgia: Georgia Cent. R. R. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

Maryland: Baltimore & O. R. R. *v.* State, 81 Md. 371, 32 Atl. 201.

Texas: Dallas & W. Ry. *v.* Spicker, 61 Tex. 427.

[122] Ryan *v.* Oshkosh G. L. Co., 138 Wis. 466, 120 N. W. 264.

[123] *United States:* Kountz *v.* Toledo S. L. & W. R. R., 189 Fed. 494.

Alabama: Richmond & D. R. R. *v.* Freeman, 97 Ala. 289, 11 So. 800.

California: Munro *v.* Pacific C. D. Co., 84 Cal. 515, 24 Pac. 303; Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 975; Evarts *v.*

loss of his society; [124] but in some jurisdictions no recovery is allowed on this account.[125]

The Georgia statute [126] gives to the widow the right to recover the full value of her husband's life. This statute was meant to alter the rule that the family could only recover the value of the life to it, *i. e.*, the support they would derive from it. Hence the jury is to give, under the new statute, the entire prospective value of the life; the sum which would produce an annuity corresponding to the probable prospective income and earnings of the deceased.[127] In a State where the damages recoverable are the damages to the estate of the deceased, a recovery by the administrator of a married woman must be limited by the fact that a married woman's time is not her own; and no recovery can be had for the husband's loss.[128]

§ 579. Next of kin.

Where, as formerly in the New York statute, it is provided that the amount recovered shall be for the exclusive benefit of the widow and next of kin, questions arise which do not need to be considered where the action is given, as in the English

Santa Barbara C. R. Co., 3 Cal. App. 463, 86 Pac. 830; Jones *v.* Leonardt, 10 Cal. App. 284, 101 Pac. 811; Peters *v.* Southern Pac. Co., 116 Pac. 400.

Florida: Florida C. & P. R. R. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Hawaii: Kake *v.* Horton, 2 Hawaii, 209.

Maryland: Baltimore & O. R. R. *v.* State, 24 Md. 271.

Missouri: Haines *v.* Pearson, 107 Mo. App. 481, 81 S. W. 645.

Montana: Mize *v.* Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 Pac. 971.

South Carolina: Petrie *v.* Columbia & G. R. R., 29 S. C. 303, 7 S. E. 515.

Texas: Paris & G. N. Ry. *v.* Robinson, 127 S. W. 294.

Utah: Wells *v.* Denver & R. G. W. Ry., 7 Utah, 482, 27 Pac. 688; Chilton *v.* Union Pac. Ry., 8 Utah, 47, 29 Pac. 963.

Virginia: Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838; Norfolk & W. Ry. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Wisconsin: Keeley *v.* Great No. Ry., 139 Wis. 448, 121 N. W. 167.

[124] *United States:* Kountz *v.* Toledo S. L. & W. R. R., 189 Fed. 494.

California: Green *v.* Southern Pacific Co., 122 Cal. 563, 55 Pac. 577.

Missouri: Knight *v.* Sadtler L. & Z. Co., 75 Mo. App. 541, 550.

Texas: Gulf, C. & S. F. Ry. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

Utah: Wells *v.* Denver & R. G. W. Ry., 7 Utah, 482, 27 Pac. 688.

[125] *Indiana:* Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390.

Tennessee: Illinois C. R. R. *v.* Bentz, 108 Tenn. 670, 69 S. W. 317.

[126] Code, § 2972.

[127] Georgia R. R. *v.* Pittman, 73 Ga. 325.

[128] Stulmuller *v.* Cloughly, 58 Iowa, 738, 13 N. W. 55.

statute, for the benefit of "the wife, husband, parent, and child." Thus it was held in New York, prior to the amendment of 1870 (L. of 1870, c. 78), by which the husband was included among those entitled to recover, that under the wording "next of kin," the husband could not recover.[129] Under what circumstances the "next of kin" may recover for the death of a relative under the statute is considered in Chicago & A. R. R. *v.* Shannon,[130] where the court says: "If the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent upon the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss, for which compensation under the statute must be given." The damages are therefore such as may fairly and reasonably be proved to have been suffered by the next of kin, either by depriving them of support during the life of the deceased or of an inheritance at his death.[131] The actual probability of advantage to the next of kin from the continuance of the life must be shown by the evidence; no such advantage will be presumed.[132] But to entitle the plaintiff to recover, it is not necessary that he should have

[129] Dickins *v.* New York C. R. R., 23 N. Y. 158; Drake *v.* Gilmore, 52 N. Y. 389; Green *v.* Hudson R. R. R., 2 Keyes, 294; Lucas *v.* New York C. R. R., 21 Barb. 245. A contrary view of this question is taken in Steel *v.* Kurtz, 28 Oh. St. 191.

[130] 43 Ill. 338.

[131] *United States:* The O. L. Hallenbeck, 119 Fed. 468.

Alabama: Bessemer, L. & I. Co. *v.* Campbell, 121 Ala. 50, 25 So. 793; Louisville & N. R. R. *v.* Jones, 130 Ala. 456, 30 So. 586.

Delaware: Coughlan *v.* Phila., B. & W. R. R., 6 Pennew. 242, 67 Atl. 148.

Nebraska: Anderson *v.* Chicago, B. & Q. R. R., 35 Neb. 95, 52 N. W. 840.

New York: Conklin *v.* Central New York Telephone & Tel. Co., 114 N. Y. Supp. 190, 130 App. Div. 308.

Tennessee: Davidson-Benedict Co. *v.* Severson, 109 Tenn. 572, 12 S. W. 967.

In an action for the benefit of the next of kin of a married woman it was held that since her services belonged to her husband, they could not be of pecuniary benefit to her next of kin during his life; and whether she might have outlived the husband and her services become a pecuniary benefit to her kin is too remote to be considered. May *v.* West Jersey & S. R. R., 62 N. J. L. 63, 42 Atl. 163.

[132] *California:* Burk *v.* Arcata & M. R. R. R., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52.

Indiana: Cleveland, C., C. & S. L. R.

had a legal claim for support on the deceased.[133] It would seem that nominal damages at least may, whenever the action is given, be recovered.[134]

§ 580. Evidence—Family circumstances.

In a few jurisdictions the doctrine appears to be established that the conditions and circumstances of the plaintiff cannot be shown to increase or diminish the damages.[135] That view is ably considered by Cooley, C. J., in Chicago & Northwestern Railway *v.* Bayfield,[136] where the learned judge said: "The damages recoverable in a case of this nature are by the statute to be assessed with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person. They have no regard to the needs of the person designated, or to any moral obligation which may have rested upon the deceased to supply their wants. . . . What the family would lose by the death would be, what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime; and to show that the family was poor has no tendency towards showing whether this was or was likely to be large or small." In Illinois C. R. R. *v.* Baches [137] it was held erroneous for the court below to refuse to instruct the jury that the pecuniary circumstances of the plaintiff and her infant

R. *v.* Drumm, 32 Ind. App. 547, 70 N. E. 286.

[133] *United States:* Ill. Cent. R. R. *v.* Barron, 5 Wall. 90, 18 L. ed. 591.

Indiana: Smith *v.* R. R., 35 Ind. App. 188, 73 N. E. 928; Henry *v.* Prendergast, 94 N. E. 1015.

New Jersey: Paulmier *v.* Erie R. R., 34 N. J. L. 151.

Ohio: Grotenkemper *v.* Harris, 25 Oh. St. 510.

[134] *Illinois:* Chicago *v.* Scholten, 75 Ill. 468.

Kansas: Atchison, T. & S. F. R. R. *v.* Weber, 33 Kan. 543, 6 Pac. 877.

Ohio: Johnston *v.* Cleveland & T. R. R., 7 Oh. St. 336. See *In re* California, N. & I. Co., 110 Fed. 670, 678, in which nominal damages were disallowed, but only because such damages are never given in admiralty.

[135] *Illinois:* Chicago & N. W. R. R. *v.* Moranda, 93 Ill. 302; Pennsylvania Co. *v.* Keane, 143 Ill. 172, 32 N. E. 260; Chicago, etc., R. R. *v.* Woolridge, 174 Ill. 330, 335, 51 N. E. 701; St. Louis, etc., R. R. *v.* Rawley, 90 Ill. App. 653. In North Chicago St. R. R. *v.* Brodie, 156 Ill. 317, 40 N. E. 942, it was shown that deceased was an habitual drunkard.

Pennsylvania: Pennsylvania R. R. *v.* Butler, 57 Pa. 335; Mansfield Coal Co. *v.* McEnery, 91 Pa. 185, 36 Am. Rep. 662. And see Wilcox *v.* Wilmington C. By., 2 Pennew. (Del.) 157, 44 Atl. 686.

[136] 37 Mich. 205, 214.

[137] 55 Ill. 379, 389.

daughter, and the fact that the plaintiff had a deformity of her hand, could not increase or diminish the amount of damages under the statute, the court saying: "How she has lost more money by being crippled than if she had not been, by the death of her husband, is not to our minds in any wise apparent. The question is how much has she lost in a pecuniary view, and the jury should be required to assess damages in this class of cases alone on that basis."

This view, however, is not usually held; for all circumstances which throw any light on the amount of loss suffered by the death should be shown. So all evidence bearing on the habits and the condition of the plaintiff may be introduced, if it would tend to show what assistance would have been furnished by the deceased.[138] Thus a widow, suing as administratrix of her deceased husband, may show the number of children dependent upon her,[139] and that she had no other means of support than the deceased.[140] So in the case of the death of minors, the con-

[138] *Iowa:* Donaldson *v.* Mississippi & Mo. R. R., 18 Ia. 280; Eginoire *v.* Union County, 112 Ia. 558, 84 N. W. 758.

Kansas: Kansas P. Ry. *v.* Cutter, 19 Kan. 83.

Tennessee: Davidson-Benedict Co. *v.* Severson, 109 Tenn. 572, 12 S. W. 967.

Texas: Houston & T. C. R. R. *v.* Loeffler (Tex. Civ. App.), 51 S. W. 536.

Wisconsin: Thoresen *v.* La Crosse City Ry., 94 Wis. 129, 133, 68 N. W. 548.

Family expenses may be shown. Hudson *v.* Houser (Ind.), 24 N. E. 243.

The fact that widow is a prostitute who had long lived apart from deceased may be shown. Orendorf *v.* New York C. & H. R. R. R., 119 App. Div. 638 104 N. Y. Supp. 222.

[139] *United States:* Atchison, T. & S. F. R. R. *v.* Wilson, 48 Fed. 57.

Kansas: Coffeyville Mining Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

Missouri: Tetherow *v.* St. Joseph & D. M. R. R., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; O'Mellia *v.* Kansas City, S. J. & C. B. R. R., 115 Mo. 205, 21 S. W. 503.

Nebraska: Kerkow *v.* Bauer, 15 Neb. 150.

Wisconsin: Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

Contra, Louisville & N. R. R. *v.* Banks, 132 Ala. 471, 31 So. 573.

In Spiro *v.* Felton, 73 Fed. 91, the court allowed the evidence on the ground that the children were distributees.

In O'Mellia *v.* Kansas City, S. J. & C. B. R. R., 115 Mo. 205, 21 S. W. 503 (*supra*) the court made a distinction between a surviving mother and a surviving father, intimating that the latter could not show the number of children. Yet surely such evidence would be admissible, as showing the value of the mother's services in bringing up the children, which he has lost by the death.

[140] *California:* Kerrigan *v.* Market St. R. R., 138 Cal. 506, 71 Pac. 621.

Wisconsin: Annas *v.* Milwaukee & N. R. R., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

dition of the parents may be given in evidence;[141] and in the case of the death of a parent, that he left minor children,[142] and that they were in poor health.[143] Such evidence is admitted to assist the jury in determining the probability of pecuniary loss to the plaintiff: thus, if the father is poor, the probability is great that he would have required the services of the son; if well-to-do, the probability is equally great that he would have derived no pecuniary benefit from the service of his son; and if the children are in poor health the parent's services are the more requisite.[144]

§ 580a. Character and capacity of deceased.

For the purpose of showing the amount of loss, evidence may also be introduced of anything in the character or capacity of the deceased person which would have any bearing on the pecuniary loss resulting from his death.[145] So the earning ability of deceased and his skill in his profession may be shown, as well as his personal income;[146] but not the income of his

Contra in *Nebraska:* Gundy *v.* Nye-Schneider-Fowler Co., 131 N. W. 968 (*semble*).

[141] *United States:* Barley *v.* Chicago & A. R. R., 2 Fed. Cas. No. 997, 4 Biss. 430.

Illinois: Chicago *v.* Powers, 42 Ill. 169.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29.

Michigan: Cooper *v.* Lake Shore & M. S. Ry., 66 Mich. 261, 33 N. W. 306.

Minnesota: Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575.

Nebraska: Crabtree *v.* Missouri Pac. R. R., 86 Neb. 33, 124 N. W. 932.

New York: Pressman *v.* Mooney, 5 App. Div. 121, 39 N. Y. Supp. 44.

Pennsylvania: Hoon *v.* Beaver V. T. Co., 204 Pa. 369, 54 Atl. 270.

Texas: Gulf, C. & S. F. Ry. *v.* Younger, 90 Tex. 387, 38 S. W. 1121; Galveston, H. & S. A. Ry. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301; Sills *v.* Fort Worth & D. C. Ry. (Tex. Civ. App.), 28 S. W. 908; Citizens' R. R. *v.* Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042.

Wisconsin: Ewen *v.* Chicago & N. W. Ry., 38 Wis. 613.

[142] Brinkman *v.* Gottenstroeter, 151 Mo. App. 153, 134 S. W. 584.

[143] *Indiana:* Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Wisconsin: McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

[144] And see the remarks of Cooley, C. J., upon the admission of this kind of evidence in this class of cases, in Chicago & N. W. Ry. *v.* Bayfield, 37 Mich. 205, 215.

[145] Evidence of the personal beauty of a deceased wife cannot be shown, since it did not affect the pecuniary loss of the husband. Smith *v.* Lehigh V. R. R., 177 N. Y. 379, 69 N. E. 729.

[146] *United States:* Louisville & S. L. R. R. *v.* Clarke, 152 U. S. 230, 242, 14 Sup. Ct. 579, 38 L. ed. 425.

Tennessee: Louisville & N. R. R. *v.* Howard, 90 Tenn. 144, 19 S. W. 116.

Wisconsin: Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234.

business, since that might not be affected by his death.[147] Chance of promotion may be shown in a proper case,[148] and it may also be shown that deceased had previously earned more than he was earning at the time of his death; [149] on the other hand, the diminution of earning power with advancing age may be considered.[150] Personal habits of the deceased which would affect his value to his family may be shown, as for instance habits of intoxication, which might make his life a burden rather than a benefit; [151] on the other hand, it is not material to show the good character of the deceased, as that he was a member of the church and did not use profane language.[152]

In Gregory *v.* R. R., 126 Iowa, 230, 101 N. W. 761, an action for negligently causing death of a girl of 2, wages of female school teachers in the locality were held admissible to show the value of the life. But in Atlanta & West Point R. R. *v.* Newton, 85 Ga. 517, 11 S. W. 776, evidence was held inadmissible which was offered to show the value of the services of the deceased in occupations in which he had never engaged. In Alabama, S. & W. Co. *v.* Griffin, 149 Ala. 423, 42 So. 1034, plaintiff was allowed to show probable earnings in several trades, in all of which deceased had engaged.

[147] *Pennsylvania:* McCracken *v.* Traction Co., 201 Pa. 384, 50 Atl. 832.

Tennessee: Louisville & N. R. R. *v.* Howard, 90 Tenn. 144, 19 S. W. 116 (income from farm).

Nor expected profits from particular business transactions. Karan *v.* Pease, 45 Ill. App. 382, 388.

[148] *Iowa:* Brown *v.* Chicago, R. I. & P. R. R., 64 Iowa, 652, 21 N. W. 193.

Texas: St. Louis, A. & T. Ry. *v.* Johnston, 15 S. W. 104.

[149] *Georgia:* Central of Georgia R. R. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365.

Iowa: Grimmelman *v.* Union Pac. R. R., 101 Iowa, 74, 70 N. W. 90.

[150] Western, etc., R. R. *v.* Moore, 94 Ga. 457, 20 S. E. 640.

[151] *Illinois:* North Chicago St. R. R. *v.* Brodie, 156 Ill. 317, 40 N. E. 942.

Indiana: Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227.

Texas: Standlee *v.* St. Louis S. W. Ry., 25 Tex. Civ. App. 340, 60 S. W. 781.

In Boswell *v.* Barnhart, 96 Ga. 52, 23 S. E. 414, however, defendant was not allowed to show that deceased was always in criminal scrapes, and that his family was better off after his death than before. And in Texas & P. Ry. *v.* Moody (Tex. Civ. App.), 23 S. W. 41, defendant was not allowed to show that deceased was a negro, for the purpose of arguing that family ties are not strong among negroes. In Galveston, H. & S. A. Ry. *v.* Harris (Tex. Civ. App.), 36 S. W. 776, testimony that the deceased expended his earnings upon a certain prostitute was held admissible for the purpose of contradicting the testimony of the plaintiff that he expended most of his wages in support of herself and his children. On the other hand, good qualities may be shown, as that he was in the habit of working about the house. International G. N. R. R. *v.* McVey (Tex. Civ. App.), 81 S. W. 991.

[152] Lipscomb *v.* Houston & T. C. Ry., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869.

For the same reason evidence may be introduced of the feeling of the deceased toward his surviving relatives, whether favorable [153] or unfavorable; [154] and, as bearing on the probability of pecuniary assistance, what he had been in the habit of doing for them [155] and what he had promised them to do or had represented to others that he intended to do.[156]

§ 581. Probable duration of life.

As the probable duration of the life of the deceased is one of the elements to be considered by the jury in their award of damages under the statute, mortality tables may be introduced in evidence.[157] But they must be allowed no more effect than to

[153] Cincinnati St. Ry. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300.

[154] Disbrow *v.* Ulster T. (Pa.), 8 Atl. 912.

[155] Evidence that deceased had contributed to support of survivors:

Indiana: Lake Erie & W. R. R. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Minnesota: Kerling *v.* G. W. Van Dusen & Co., 108 Minn. 51, 124 N. W. 235.

But see Bridge, etc., Co. *v.* La Mantia, 112 Ill. App. 43.

Evidence that deceased had not so contributed:

Georgia: Smith *v.* Hatcher, 102 Ga. 58, 29 S. E. 162.

Maryland: Baltimore & O. R. R. *v.* State, 81 Md. 371, 32 Atl. 201.

[156] *Indiana:* Southern Indiana R. R. *v.* Moore, 34 Ind. App. 154, 72 N. E. 479 (had bought and was paying for home for his mother, who survived).

Texas: Houston, etc., R. R. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204 (son said he would support mother in future); Atchison, T. & S. F. R. R. *v.* Van Belle, 26 Tex. Civ. App. 511, 64 S. W. 397 (son had said he would give his parents all the money he earned); Freeman *v.* Carter (Tex. Civ. App.), 81 S. W. 81 (boy of ten said he should support his parents in after life); St. Louis S. W. Ry. *v.* Huey (Tex. Civ. App.), 130 S. W. 1017 (son said he should aid his father pecuniarily).

Washington: Dean *v.* R., etc., Co., 38 Wash. 565, 80 Pac. 842 (son who had run away said he should return and support his parents).

Wisconsin: Bright *v.* Barnett & Record Co., 88 Wis. 299, 60 N. W. 418 (son had said he should not marry, but would support his parents).

[157] *Georgia:* David *v.* Southwestern R. R., 41 Ga. 223; Georgia R. R. *v.* Pittman, 73 Ga. 325.

Iowa: Donaldson *v.* Mississippi & M. R. R. R., 18 Ia. 280, 87 Am. Dec. 391.

Kentucky: Louisville & N. R. R. *v.* Kelly, 100 Ky. 421, 38 S. W. 852.

Minnesota: Scheffler *v.* Minneapolis & St. L. Ry., 32 Minn. 518, 21 N. W. 711; Diesen *v.* Chicago, S. P., M. & O. Ry., 43 Minn. 454, 45 N. W. 864.

Missouri: O'Mellia *v.* Kansas City, S. J. & C. B. R. R., 115 Mo. 205, 21 S. W. 503.

New York: Sauter *v.* New York C. & H. R. R. R., 66 N. Y. 50.

Pennsylvania: Emery *v.* Phila., 208 Pa. 492, 57 Atl. 977.

Texas: Gulf, C. & S. F. Ry. *v.* Compton, 75 Tex. 667, 13 S. W. 667 (*semble:* the jury may find expectancy without the aid of tables); Missouri, K. & T. Ry. *v.* Hines, 18 Tex. Civ. App. 580, 40 S. W. 152.

prove the probable continuance of life. In Central Railroad *v.* Thompson, [158] Jackson, C. J., said: "The tables prepared for life insurance do not contemplate at all ability to work, and how long that ability will continue, and how much it will decrease as age increases, but those tables only calculate life's duration, however feeble and incapable of labor that life will be in old age." So any disease of the deceased that would tend to shorten his life, may be shown upon the question of the probable continuance of life.[159] Thus it may be proved that the deceased was suffering from a pulmonary disease.[160] And it may also be shown that the deceased was employed in an extra-hazardous occupation.[161]

§ 582. Excessive verdicts.

While the jury has great discretion in determining the amount of the recovery the discretion is not altogether unlimited, even in jurisdictions where "the jury may give such damages as they shall deem fair and just." "The jury are not warranted in giving damages not founded upon the testimony or beyond the measure of compensation for the injury inflicted. They cannot give damages founded upon their fancy, or based upon visionary estimates or probabilities or chances.[162] If the ver-

Virginia: Norfolk & W. Ry. *v.* Spencer, 104 Va. 657, 52 S. E. 310.

Wisconsin: Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

England: Rowley *v.* London & N. W. Ry., L. R. 8 Ex. 221.

The jury is not obliged to follow the tables when the deceased was engaged in a hazardous employment. Western & A. R. R. *v.* Clark, 117 Ga. 548, 44 S. E. 1.

In Mississippi the tables are not admissible when the deceased was suffering from disease which might shorten his life, as the tables are not applicable to such a person. Mississippi Cotton Oil Co. *v.* Smith, 95 Miss. 528, 48 So. 735.

[158] 76 Ga. 770, 783.

[159] *New Jersey:* Williams *v.* Camden & A. R. R., 61 N. J. L. 646, 37 Atl. 1107.

North Carolina: Meekins *v.* Norfolk & S. Ry., 134 N. C. 217, 46 S. E. 493.

Wisconsin: Schaidler *v.* Chicago & N. W. Ry., 102 Wis. 564, 78 N. W. 732.

For the general scope of a proper charge in such cases, see St. Louis, I. M. & S. Ry. *v.* Needham, 10 U. S. App. 339, 52 Fed. 371, 3 C. C. A. 129.

[160] Columbus & W. Ry. *v.* Bridges, 86 Ala. 448, 5 So. 864.

[161] *Georgia:* Western, etc., R. R. *v.* Clark, 117 Ga. 548, 44 S. E. 1.

North Carolina: Watson *v.* Seaboard A. L. Ry., 133 N. C. 188, 45 S. E. 555.

Tennessee: Illinois Cent. R. R. *v.* Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

[162] Cooper *v.* Railway, 66 Mich. 271, 33 N. W. 306.

dict is clearly excessive it will be set aside by the court.[163] We shall consider later what verdicts have been held excessive.[164]

§ 583. Reduction of damages.

That the acquisition of property by the plaintiff from the death of the deceased cannot be shown in diminution of damages is apparent, from the consideration that there is no advantage obtained, since the property would ultimately vest in the plaintiff on the natural death of the deceased, and that it is for the intermediate pecuniary loss that the action is given by the statute.[165] In Sherlock *v.* Alling,[166] an action brought under the statute, the question was raised whether the receipt of a sum of money by the persons for whose benefit the action was prosecuted, on account of a policy of insurance on the life of the deceased, could be shown to reduce the amount of the recovery, and it was held that it could not, the court saying: "To allow such a defense would defeat actions, under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children; and the wrongdoer would thus be enabled to protect himself against the consequences of his own wrongful act." And this is the universal rule.[167] Nor can the damages recoverable by a husband for the death of his wife be reduced by showing that he has married a second wife who performs the services formerly performed by the first wife,[168] or the damages recoverable by a wife for loss of services of the husband be reduced by showing that she has married a second husband,[169] who is a better provider than the first.[170]

[163] Walker *v.* Lake Shore & M. S. Ry., 104 Mich. 606, 62 N. W. 1032.

[164] *Post*, chap. lvii.

[165] *Alabama:* Sloss-Sheffield S. & I. Co. *v.* Holloway, 144 Ala. 280, 40 So. 211.

New York: Terry *v.* Jewett, 78 N. Y. 338.

Pennsylvania: Stahler *v.* Philadelphia & R. R. R., 199 Pa. 383, 49 Atl. 273, 85 Am. St. Rep. 791.

Texas: San Antonio & A. P. Ry. *v.* Long (Tex. Civ. App.), 26 S. W. 114.

[166] 44 Ind. 184, 200.

[167] *Ante*, § 67*a*.

[168] *Indiana:* Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696.

Ohio: Davis *v.* Guarnieri, 45 Oh. St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

Texas: Gulf, C. & S. F. Ry. *v.* Younger, 90 Tex. 387, 38 S. W. 1121.

[169] *Illinois:* Chicago & E. I. R. R. *v.*

[170] Georgia R. & B. Co. *v.* Garr, 57 Ga. 277, 24 Am. Rep. 492.

§ 584. Exemplary damages.

Exemplary damages cannot generally be recovered in actions for death.[171] So in Conant *v.* Griffin [172] it was said to be erroneous to admit evidence as to the wealth of the defendant, with a view to giving exemplary damages in an action under the statute. In some States, however, such damages are expressly allowed by the statute.[173]

Driscoll, 207 Ill. 9, 69 N. E. 620; O. S. Richardson F. Co. *v.* Peters, 82 Ill. App. 508.

Nebraska: Chicago, S. P., M. & O. Ry. *v.* Lagerkrans, 65 Neb. 566, 91 N. W. 358.

A fortiori the fact that she is left free to get a better husband if she can may not be considered. Rafferty *v.* Buckman, 46 Iowa, 195.

[171] *United States:* Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619.

Alabama: Louisville & N. R. R. *v.* Orr, 91 Ala. 548, 8 So. 360; Thompson *v.* Louisville & N. R. R., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146; Williams *v.* South. etc., R. R., 91 Ala. 635, 9 So. 77.

California: Burk *v.* Arcata & Mad River R. R., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52.

Colorado: Kansas P. R. R. *v.* Miller, 2 Colo. 442; Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348.

Delaware: Tully *v.* Philadelphia, etc., R. R., 3 Pennew. 455, 50 Atl. 95.

Illinois: West Chicago St. R. R. *v.* Dooley, 76 Ill. App. 424. (But exemplary damages for death may be recovered under the civil damage act. Belting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048.)

Iowa: Spaulding *v.* Chicago, etc., R. R., 98 Iowa, 205, 67 N. W. 227.

Kansas: Atchison, T. & S. F. Ry. *v.* Townsend, 71 Kan. 524, 81 Pac. 205.

Maine: McKay *v.* New England Dredging Co., 92 Me. 454, 43 Atl. 29; Oakes *v.* Maine Cent. R. R., 95 Me. 103, 49 Atl. 418.

Ohio: Cincinnati St. Ry. *v.* Altemeier, 60 Ohio St. 10.

Pennsylvania: Pennsylvania R. R. *v.* Henderson, 51 Pa. 315.

South Carolina: Garrick *v.* Florida Cent. & P. R. R., 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874; Nohrden *v.* North Eastern R. R., 54 S. C. 492, 32 S. E. 524.

England: Smith *v.* London & N. W. Ry., 2 E. & B. 69.

[172] 48 Ill. 410.

[173] *California:* Myers *v.* San Francisco, 42 Cal. 215.

Kentucky: Chiles *v.* Drake, 2 Met. 146, 74 Am. Dec. 406; Bowler *v.* Lane, 3 Met. 311; Kentucky C. R. R. *v.* Gastineau, 83 Ky. 119; Owensboro & N. Ry. *v.* Barclay, 102 Ky. 16, 43 S. W. 177; Louisville & N. R. R. *v.* Ward, 44 S. W. 1112, 19 Ky. L. Rep. 1900.

New Mexico: Cerrillos Coal R. R. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

Tennessee: Kansas City, F. S. & M. R. R. *v.* Daughtry, 88 Tenn. 721.

Texas: March *v.* Walker, 48 Tex. 372.

In some States, the damages are made entirely punitive. Thus in Alabama the statute is an act "to prevent homicides," and the compensation of the next of kin is regarded only as a "fortuitous result of the punishment." The damages being entirely exemplary, their admeasurement depends on the degree of negligence or culpability shown and not the loss occasioned to the living.

United States: Louisville & Nashville R. R. *v.* Lansford, 42 C. C. A. 160, 102 Fed. 62.

So in *Missouri:* Hachl *v.* Wabash R. R., 119 Mo. 325, 24 S. W. 737.

§ 584a. Presumptions and pleading.

Under the Illinois statute certain presumptions are made as to damage following death. The law presumes pecuniary loss to a parent, and for such loss, without express proof of damage, substantial damages may be recovered.[174] So loss is presumed to a lineal descendant.[175] But there is no such presumption in the case of collateral kin, even brother or sister,[176] and actual loss must be shown to justify a verdict.[177]

In Indiana pecuniary loss will be presumed to a widow and a child.[178]

Whatever the presumption, no special damage to the next of kin need be pleaded, as the statute is held to contemplate some damage.[179]

§ 585. Contributory negligence.

* In England it has been held that the rule of the common law is applicable to this statute; that the action is to be treated as if the injured party had brought it; and that, if his negligence contributed to the disaster, the plaintiff cannot recover.[180] Such, too, is the doctrine in this country. So, in New York, where a lunatic, in charge of his father, was killed by being run over by a railway car; but it appeared that his death was owing, not to the negligence of the railway company or its agents, but to the carelessness of the father of the lunatic, it was held that no recovery could be had.[181] ** But in Texas it has been held that killing a man by making him drink three pints of whisky was actionable, though the experiment was made with the con-

[174] Bradley *v.* Sattler, 156 Ill. 603, 41 N. E. 171; Chicago, etc., R. R. *v.* Huston, 196 Ill. 480, 63 N. E. 1028; Grace & Hyde Co. *v.* Strong, 127 Ill. App. 336.

[175] Chicago, P. & S. L. R. R. *v.* Woolridge, 174 Ill. 330, 51 N. E. 701; Chicago, etc., R. R. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Dukeman *v.* Cleveland, C., C. & St. L. Ry., 237 Ill. 104, 86 N. E. 712.

[176] Bridge Co. *v.* La Mantia, 112 Ill. App. 43.

[177] Rhoads *v.* Chicago & A. Ry., 227 Ill. 328, 81 N. E. 371, affirming s. c. 130 Ill. App. 145; Huff *v.* Peoria & Eastern R. R., 127 Ill. App. 242.

[178] Louisville & N. R. R. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883.

[179] *Illinois:* Chicago *v.* Hesing, 83 Ill. 204, 35 Am. Rep. 378; Stafford *v.* Rubens, 115 Ill. 196, 3 N. E. 568.

Minnesota: Barnum *v.* Chicago, M. & St. P. Ry., 30 Minn. 461; Johnson *v.* St. Paul & D. R. R., 31 Minn. 283.

[180] Tucker *v.* Chaplin, 2 Car. & Kir. 730.

[181] Willetts *v.* Buffalo & R. R. R., 14 Barb. (N. Y.) 585.

sent of the deceased.[182] If contributory negligence does not bar the action, it has been held that it may be shown in mitigation of damages.[183]

[182] McCue *v.* Klein, 60 Tex. 168, 48 Am. Rep. 260.

[183] Western & A. R. R. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646.

CHAPTER XXVI

DAMAGES IN ADMIRALTY

§ 586. Rules adopted in admiralty.
587. Collision—Division of loss.
588. Liability to third parties.
589. General principles of recovery —Consequential damages.
590. Limitation of liability.
591. Reduction of damages.
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597. Costs.
597a. Interest.
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599. Personal injury—Division of Loss.
599a. Nominal damages in admiralty.
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§ 586. Rules adopted in admiralty.

At common law, if the plaintiff is not in fault, he recovers substantial damages, but if, on the other hand, the defendant can show him to have been guilty of contributory negligence, he covers nothing. There is no attempt to apportion the loss. In courts of admiralty, on the other hand, where both parties are in fault, the rule is wholly different; though not strictly within the scope of this treatise, it may be advantageous here, having disposed of the subject of torts at common law, to consider briefly the effect of a different system of rules.

§ 587. Collision—Division of loss.

In cases of collision, where both vessels are in fault the sums representing the damage sustained by each, are added together and the aggregate divided between the two.[1] This is in effect deducting the lesser from the greater, and dividing the re-

[1] *United States:* The Catharine *v.* Dickinson, 17 How. 170, 15 L. ed. 233; Chamberlain v. Ward, 21 How. 548, 16 L. ed. 211; Union S. S. Co. *v.* New York S. S. Co., 24 How. 307, 16 L. ed. 699; The Morning Light, 2 Wall. 550, 17 L. ed. 862; The Gray Eagle, 9 Wall. 505, 19 L. ed. 741; The Continental, 14 Wall. 345, 20 L. ed. 801; The Sapphire, 18 Wall. 51, 21 L. ed. 814; The Teutonia, 23 Wall. 77, 23 L. ed. 44; The Sunnyside, 91 U. S. 208, 215, 23 L. ed. 302; The America, 92 U. S. 432, 23 L. ed. 724; The Stephen Morgan, 94 U. S.

mainder. The effect of this rule is that the vessel least injured contributes to the extent of half this remainder to the loss of the other vessel. Thus if one vessel is injured to the extent of $25,000, and the other to the extent of $75,000, the first will contribute $25,000 to the loss of the latter. If the vessel in fault has sustained no injury, it is liable for half the damage sustained by the other, though that other was also in fault.

Where several vessels independently operated are all in fault, the loss is to be divided equally between all the vessels,[2] even though one owner owns two or more of them.[3]

The rule of division of damages prevails also when the collision is occasioned by inscrutable fault,[4] but if the collision

599, 24 L. ed. 266; The Connecticut, 103 U. S. 710, 26 L. ed. 467; The Manitoba, 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. 1158; The Magenta, 2 Abb. U. S. 495; The Kolon, 9 Ben. 197; The Brothers, 2 Biss. 104; The Phœnix, 3 Blatch. 273, Fed. Cas. No. 11,111; The Pavonia, 23 Blatch. 403; The Frisia, 24 Blatch. 40; Ralston *v.* The State Rights, Crabbe C. C. 22; The Monticello, 1 Lowell, 184; The Clover, 1 Lowell, 342; The Neil, 3 McCr. 177; Memphis Packet Co. v. Yaeger Transp. Co., 3 McCr. 259; Foster *v.* The Miranda, 6 McLean, 221; Lucas *v.* The Thomas Swann, 6 McLean, 282; Cannon *v.* The Potomac, 3 Woods, 158; The Alabama, 4 Woods, 48; The Ant, 10 Fed. 294; The Monticello, 15 Fed. 474; The B. & C., 18 Fed. 543; La Champagne, 43 Fed. 444; The Oregon, 45 Fed. 62; The Oneida, 84 Fed. 716; The Paoli, 92 Fed. 944; Jacobson *v.* Dalles P. & A. N. Co., 106 Fed. 428; The Hanson H. Keyes, 107 Fed. 537; The S. A. McCauley, 116 Fed. 107; The Itaska, 117 Fed. 885; The Hoyt, 136 Fed. 671; The Bellingham, 138 Fed. 619; The Depew, 139 Fed. 236; Ross *v.* Cornell Steamboat Co., 149 Fed. 196; The Dreamland. 149 Fed. 910; The Aries, 165 Fed. 514; The Director, 180 Fed. 606.

Louisiana: Brickell *v.* Frisby, 2 Rob. 204.

Washington: Puget Sound Com. Co. *v.* The Taylor, 2 Wash. Terr. 93.

England: The Agra & Elizabeth Jenkins, 4 Moore P. C. (N. S.) 435; The Singapore and Hebe, 4 Moore P. C. (N. S.) 271.

A few cases, however, have declined to make an equal division of the loss, and have apportioned the damage in proportion to the fault. Thompson *v.* The Great Republic, 23 Wall. 20, 23 L. ed. 55; The Rival, 1 Sprague, 128; The Mary Ida, 20 Fed. 741; The Anerly, 58 Fed. 744; The Victory, 68 Fed. 395; The Chattahoochee, 74 Fed. 899.

[2] The Manhattan, 181 Fed. 229.

[3] The Moran, 212 U. S. 466, 53 L. ed. 600, 29 Sup. Ct. 339.

[4] The Comet, 1 Abb. C. C. 451; The Bronson, 3 Ben. 341, 24 Fed. Cas. No. 14,131; Lucas *v.* The Swann, 6 McLean, 282; The John Henry, 3 Ware, 264; The Nautilus, 1 Ware, 2d ed., 529; The David Dows, 16 Fed. 154. But *contra*, that where there is a reasonable doubt as to which vessel was to blame there can be no recovery. The Breeze, 6 Ben. 14, *per* Blatchford, J.; The Summit, 2 Curt. 150, *per* Curtis, J.; The Worthington *v.* Davis, 19 Fed. 836; The Jemina, 149 Fed. 171.

is the result of inevitable accident, each vessel, in this country, must bear her own loss.[5] In some cases although there is no fault, so far as the collision is concerned, on the part of the damaged vessel, but the damage is largely caused by the unseaworthiness of the vessel, the fault is treated as mutual and the loss is divided;[6] or if the unseaworthiness of the damaged vessel alone is responsible for the loss, no recovery is allowed.[7]

In dividing the damages under this rule, no regard is paid to the difference in value between the vessels.[8]

§ 588. Liability to third parties.

Where both vessels are in fault, a party whose goods are injured can recover all the damages against the vessel libelled by him, *i. e.*, the principle of the division of the loss applies only as between the colliding vessels.[9] So where a collision occurred between The Atlas and The Kate, whereby a canal-boat in the tow of the latter was injured and goods were destroyed, which the libellant had insured, he was allowed to recover the whole amount of the loss against The Atlas, the only vessel he libelled.[10] In the case of The Juniata,[11] it appeared that there had been a collision between The Juniata, a steamship, and a tug-boat, by which property of the United States, in the tug-boat's tow, was destroyed. Both the steamship and the tug were at fault. A libel was filed against The Juniata alone. It was held that the United States could recover full damages against it, and that The Juniata's claim against the tug-boat must be settled in other proceedings.

[5] Stainback *v.* Rae, 14 How. 532, 14 L. ed. 530; The Grace Girdler, 7 Wall. 196, 19 L. ed. 113; The Sunnyside, 91 U. S. 208, 215, 23 L. ed. 302; The J. L. Hasbrouck, 14 Blatch. 30; The City of Paris, 14 Blatch. 531; Ward *v.* The Fashion, Newb. Adm. 8; The Nautilus, 1 Ware, 2d ed., 529.

[6] The Syracuse, 18 Fed. 828; The Reba, 22 Fed. 546; The Starbuck, 29 Fed. 797. But see Boston T. B. Co. *v.* Pettie, 49 Fed. 464, 1 C. C. A. 314, 1 U. S. App. 57, 63.

[7] Mould *v.* The New York, 40 Fed. 900; The Gen. George G. Meade, 8 Ben. 481; The Charles R. Stone, 9 Ben. 182.

[8] The Nautilus, 1 Ware, 2d ed., 529.

[9] The Bernina, 13 App. Cas. 1; Holland *v.* Brown, 35 Fed. 43; The Britannic, 39 Fed. 395; The Eagle Point, 136 Fed. 1010.

[10] The Atlas, 93 U. S. 302, 23 L. ed. 863. In Scotland, the loss is apportioned in such a case. Hay *v.* LeNeve, 2 Shaw H. L. 395; The Washington, 5 Jur. 1067.

[11] 93 U. S. 337, 23 L. ed. 930.

Swayne, J., said: "We should adjudge that half the amount should be paid by the tug, and the other half by the steamer; but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offence being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages." In The Alabama and The Gamecock,[12] on the other hand, it appeared that the libellant's vessel had been injured by a collision between the tow-boat of his vessel, The Gamecock, and the steamer Alabama, both being in fault. The Alabama was bonded in $100,000, The Gamecock in $10,000. Both offending vessels being before the court, it was held that judgment should be entered against each for a half; but if the libellant could not recover against one all the damage, he could then proceed against the other.[13]

If one vessel is obliged to pay damages to a third party resulting from a collision in which another vessel is also at fault, the first vessel has the right to sue the other vessel subsequently for its portion of such damages.[14] In such cases, since the wrongdoers are sureties towards each other as respects claims of third parties, if one of them pending suit purchases such claims below their value the other is responsible only for his portion of the amount actually paid out with interest. One cannot speculate in the liability so as to make a profit out of the other.[15]

[12] 92 U. S. 695, 23 L. ed. 763. The cases of The Milan, 1 Lush. 388, and The Atlas, 4 Ben. 27, 10 Blatch. 459, which adopt the rule of division of loss, were cited. The court said of them: "It does not appear that any difficulty arose from the inability of either of the condemned parties to pay their share of the loss. No such inability seems to have existed. And when it does not exist, the application of the moiety rule operates justly as between the parties in fault, and works no injury to others. It is only when such inability exists that a different result takes place. The cases quoted, therefore, may have been well decided and yet furnish no precedent for the case under consideration."

[13] See to the same effect: The George Washington, 9 Wall. 513, 19 L. ed. 787; The Virginia Ehrman, 97 U. S. 309, 24 L. ed. 890; The Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930; The Civilta *v.* Perry, 103 U. S. 699, 26 L. ed. 599; The Monitor & Hill, 3 Biss. 24; The Frisia, 24 Blatch. 40; The Queen, 40 Fed. 694; The Mariska, 107 Fed. 989.

[14] Erie R. R. *v.* Erie & W. T. Co., 204 U. S. 220, 51 L. ed. 450, 27 Sup. Ct. 246; The Connemaugh, 135 Fed. 240.

[15] The Gulf Stream, 64 Fed. 809, 12 C. C. A. 613, 26 U. S. App. 409.

In a few cases it has been held (contrary to the usual rule) that where one vessel is more at fault than the other they should contribute unequally in proportion to their respective faults, to pay damage suffered by a third party.[16]

§ 589. General principles of recovery—Consequential damages.

In general the same rules of damages apply in Admiralty as at common law. As far as practicable the party who has sustained an injury by collision is entitled to the amount as damages which will put him in the same condition as before the injury.[17] Conjectural damages must be excluded.[18] But necessary incidental expenses and losses are allowed, such as loss of wages, and damage to the vessel from efforts to save her at the time of the collision,[19] salvage expenses,[20] charges for wharfage while repairing,[21] and the time of those employed in raising and clearing out the vessel.[22] The owner of the vessel injured by the collision can recover the expenses incurred in retaining his crew,[23] and in attempting to save and in storing

[16] The Chattahoochee, 74 Fed. 899, 21 C. C. A. 162.

In The Victory, 68 Fed. 395, 15 C. C. A. 491, it was held that where there was great damage to the cargo the entire proceeds of the vessel most in fault would first be applied to the loss, any deficiency to be supplied by the other vessel. In The Maling, 110 Fed. 227, where three vessels were concerned, but the fault of one of the three was held to be due to the act of one of the two others, it was at first held that the damages must be divided between the two last, in the proportion of one and two-thirds; but on a rehearing, it was decided that the damages and costs must be divided equally between the three. The S. A. McCauley, 116 Fed. 107. In Jacobson *v.* Dalles P. & A. N. Co., 103 Fed. 428, the court said that "the rule in admiralty does not admit of such an apportionment" between two vessels "as would correspond to the negligence of the two respectively." See to the same effect The Hanson H. Keyes, 107 Fed. 537.

[17] The Baltimore *v.* Rowland, 8 Wall. 377, 19 L. ed. 463; The Minnie, 26 Fed. 860.

[18] The Blossom, Olcott, 188; The Narragansett, Olcott, 246.

[19] The Nautilus, 1 Ware, 2d ed., 529; Greenwood *v.* The Fletcher, 42 Fed. 504; The Switzerland, 67 Fed. 617.

[20] La Champagne, 53 Fed. 398; The Alaska, 44 Fed. 498; The Cepheus, 24 Fed. 507.

[21] The Dumont, 34 Fed. 428.

[22] Vantine *v.* The Lake, 2 Wall., Jr., 52.

[23] Hoffman *v.* Union Ferry Co., 68 N. Y. 385; Leonard *v.* Whitwell, 19 Fed. 547; The Switzerland, 67 Fed. 617; New Haven Steamboat Co. *v.* New York, 36 Fed. 716. Detaining crew and expenses thereof must be necessary. The Thorp, 46 Fed. 816.

and caring for cargo,[24] the expenses of a tug to tow the vessel to a port of safety,[25] expenses of the owner in going to view the wreck, if reasonable,[26] and of surveys, if proper,[27] superintendence of the repairs,[28] necessary readjusting of compass [29] and the expense of a new rating if necessary to effect insurance,[30] and the offending vessel is not exonerated from full damages, because after the wreck a part of the cargo was injured or lost through the efforts of a third party to save it.[31] The loss of the charter may sometimes be recovered,[32] and in certain cases commission paid to agents on the outlay for repairs is allowed.[33] There can be no recovery, however, for loss on account of disorganization of business resulting from the collision nor for lawyer's fees nor for forwarding the freight where the vessel did not give up the voyage, but only delayed it.[34]

The ordinary rules of avoidable consequences apply in admiralty. The owner of a vessel sunk through the negligence of another must endeavor to save her and if he does not cannot profit by his own remissness.[35]

Where the full value of the vessel is allowed, as upon a total loss, nothing further will be awarded for demurrage,[36] or other expenses.[37] But where the vessel was only a partial loss, it was held otherwise by a very able judge, in a case where the repairing of the vessel had been a prudent course, and the necessary repairs and demurrage together exceeded the value of the vessel at the time of the loss.[38] And even when the loss is

[24] The City of New York, 23 Fed. 616.

[25] The Benjamin F. Hunt, Jr., 34 Fed. 816; The Bulgaria, 83 Fed. 312.

[26] The Alaska, 44 Fed. 498; The California, 54 Fed. 404.

[27] The Alaska, 44 Fed. 498; The Golden Rule, 20 Fed. 198; The Venus, 17 Fed. 925.

[28] New Haven Boat Co. *v.* New York, 36 Fed. 716.

[29] The Belgenland, 36 Fed. 504.

[30] The Belgenland, *id.;* but if repairs make a radically different boat, *contra,* The Gilkey *v.* The Beta, 44 Fed. 389.

[31] The Narragansett, Olcott, 246.

[32] The Belgenland, 36 Fed. 504; The Star of India, 3 Aspin. 261; The Argentine, 13 P. D. 191.

[33] The Dorchester, 134 Fed. 564.

[34] The Glenogle, 122 Fed. 503.

[35] The Boston Towboat Co. *v.* Pettie, 49 Fed. 464, 1 C. C. A. 314, 1 U. S. App. 57; Pennsylvania Railroad Co. *v.* Washburn, 50 Fed. 335; In re Merritt and Chapman D. & W. Co., 103 Fed. 988; The Abby M. Deering, 105 Fed. 400, and *cf.* The Havilah, 50 Fed. 331, 1 C. C. A. 519, 1 U. S. App. 138. He does enough if he takes what seems the reasonable course. The City of Macon, 121 Fed. 686, 58 C. C. A. 434.

[36] The Columbus, 3 W. Rob. 158.

[37] The Reno, 134 Fed. 555.

[38] The Glaucus, 1 Lowell, 366.

total, expenses necessarily incurred to ascertain the extent of the injury, *e. g.*, in raising the vessel, may be recovered.[39]

§ 590. Limitation of liability.

By American law [40] the liability of the owner in case of collision, when free from personal fault, only extends to the value of his interest after collision, including the freight then pending; [41] so that if the ship is a total loss, further liability is extinguished.[42]

The principle of liability, when both vessels are in fault, is not that the owners of one are liable to the owners of the other for one-half the loss sustained by the latter (and *vice versa*), but that the entire damage is added together in one common mass, and equally divided between them so as to be equally borne.[43] In the North Star [44] both vessels were in fault, and one was lost. The owners of the latter claimed that they were not liable at all, because of the statutory limitation, but since the other vessel was liable they were entitled to recover half their damage, without any deduction for the half of the damages incurred by the other. But it was held that the usual rule applied, and that the vessel which had been lost was entitled to a claim against the other vessel (which suffered least) for half the difference between the amounts of their respective losses. The former "by her loss discharged her portion of the common burden, and so much more as the amount that would thus be decreed in her favor. Her delivery to the waves was tantamount to her surrender into court in case she had survived. It extinguished the personal liability of her owners by the mere operation of the maritime rule itself. As there was no decree against her owners for the payment of money, there was no room for the application in their favor of the statute of limited liability."

[39] The Venus, 17 Fed. 925; The Oneida, 84 Fed. 716.

[40] U. S. Rev. Stat., § 4283; The North Star, 106 U. S. 17, 28, 27 L. ed. 96, 1 Sup. Ct. 41. In England liability is maintained to the extent of £8 per ton, and in some cases to £15 per ton.

[41] The Harter Act does not cover losses which happen before the voyage begins: Ralli *v.* New York & T. S. S. Co., 154 Fed. 286, 82 C. C. A. 290.

[42] La Bourgogne, 117 Fed. 261; Van Eyken *v.* Erie R. R., 117 Fed. 712.

[43] The North Star, 106 U. S. 17, 22, 27 L. ed. 96, 1 Sup. Ct. 41.

[44] 106 U. S. 17, 28, 27 L. ed. 961, Sup. Ct. 41.

By the Revised Statutes and the Rules in Admiralty [45] all competing claims in collision cases are to be raised and adjusted in one suit.[46] In the Job T. Wilson [47] both vessels were in fault, one was a total loss, and an innocent sufferer from the collision was entitled to recover his whole claim from the survivor; it was held that the latter should be allowed to recoup himself, out of the money payable to the other vessel in fault. It was urged that this would permit a claim for contribution by one wrongdoer against another. But the court said that in collision cases in Admiralty, the object of the proceeding was a contribution between wrongdoers.[48] If the other vessel cannot be brought in because not within the jurisdiction this cannot defeat the right to contribution and an independent suit may be brought.[49] When innocent cargo owners are entitled to full recovery, and one vessel is entitled to recoup against the other one-half the cargo loss, and all parties are before the court, recoupment may be had even though no cross libel has been filed under such. So, in all such cases the subrogated insurer stands in the place of the party to whose rights he is subrogated and when the latter is entitled to recover only half the loss, the insurer is likewise restricted to one-half. On the other hand, the insurer subrogated to the rights of the innocent cargo-owner, recovers in full.[50]

§ 591. Reduction of damages.

It is no defense to a suit for collision that the loss has been paid by the underwriters. The trespasser has no concern with the contract with the insurer.[51] Where, in a case of collision, a decree has been obtained abroad against the offending vessel, but for an amount less than the actual loss, in an action here for the rest of the loss, against the insurance company in which the in-

[45] U. S. Rev. Stat., § 941; Admiralty Rule 59, 112 U. S. App. 743.

[46] For an account of the difficulties arising out of a contrary practice in England, see The North Star, 106 U. S. 17, 25, 27 L. ed. 96, 1 Sup. Ct. 41.

[47] 84 Fed. 209. See *acc.*, The Hercules, 20 Fed. 205; Jakobson *v.* Springer, 87 Fed. 948.

[48] *Cf.* The Virginia Shoman, 97 U. S. 309, 24 L. ed. 890; The Sterling, 106 U. S. 647, 27 L. ed. 98, 1 Sup. Ct. 89.

[49] The Mariska, 107 Fed. 989, 47 C. C. A. 115; *cf.* The New York, 108 Fed. 102, 47 C. C. A. 232; The Maine, 161 Fed. 401.

[50] The Livingstone, 104 Fed. 919.

[51] Yates *v.* Whyte, 4 Bing. N. C. 272; The Monticello *v.* Mollison, 17 How. 152, 15 L. ed. 68; The Atlas, 93 U. S. 302, 310, 23 L. ed. 863. See *ante*, § 588.

jured vessel was insured, the amount recovered abroad is to be deducted from the gross damage only, and not from the loss adjusted as a partial loss by deducting one-third new for old.[52]

§ 592. Partial loss.

The general principle followed by the admiralty courts in cases of collision is, that the damages to be assessed against the offending vessel must be sufficient to restore the other to the condition she was in at the time of collision, if restoration is practicable. The reasonable expense of repairing the vessel is therefore recoverable in case of partial loss, even if the vessel is in some respects stronger and more valuable after the repairs than she was before the collision.[53] The rule of one-third new for old does not apply in case of collision.[54] The owner cannot sell the vessel as she lies, deduct the price from her value before the collision, and recover the difference.[55] But the permanent depreciation in value is an item of compensation, in addition to the cost of repairs.[56] If the cost of raising and repairing the vessel exceeds the value, only the value can be recovered.[57]

[52] Dunham *v.* New England M. I. Co., 1 Lowell, 253.

[53] *United States:* The Catharine *v.* Dickinson, 17 How. 170, 15 L. ed. 233; The Granite State, 3 Wall. 310, 18 L. ed. 179; The Baltimore, 8 Wall. 377, 19 L. ed. 463; The Atlas, 93 U. S. 302, 307, 23 L. ed. 863 (*semble*); The Blossom, Olcott, 188; The Lotty, Olcott, 329; The Narragansett, Olcott, 388; The New Jersey, Olcott, 444; The Rhode Island, Olcott, 505; The City of Chester, 34 Fed. 429; Seabrook *v.* Raft of R. R. Cross-ties, 40 Fed. 596; Comerford *v.* The Melvina, 43 Fed. 77; The Alaska, 44 Fed. 501; The Starin, 116 Fed. 443; The Brailsbery, 127 Fed. 1005; and see The Providence, 98 Fed. 133.

Louisiana: Minor *v.* The Picayune, 13 La. Ann. 564.

Missouri: Atchison *v.* The Doctor Franklin, 14 Mo. 63.

New York: Mailler *v.* Express Propeller Line, 61 N. Y. 312.

England: Heard *v.* Holman, 19 C. B. (N. S.) 1; The Black Prince, Lush. Adm. 568; The Gazelle, 2 W. Rob. 279; The Clyde, Swabey, 23; The Inflexible, Swabey, 200.

An excessive amount paid for repairs is not recoverable, The Clark, 22 Fed. 752; The Newman, 68 Fed. 1017; and the contract price is not conclusive as to the reasonableness of the amount. The Venus, 17 Fed. 87.

[54] *United States:* The Catharine *v.* Dickinson, 17 How. 170, 15 L. ed. 233; The Baltimore, 8 Wall. 377, 19 L. ed. 463 (*semble*).

England: The Pactolus, Swabey, 173.

[55] The Catharine *v.* Dickinson, 17 How. 170, 15 L. ed. 233; The Way, 28 Fed. 526; The Havilah, 50 Fed. 331, 1 C. C. A. 519; Scott *v.* Cornell S. B. Co., 59 Fed. 638.

[56] The Favorita, 4 Ben. 132; The Transit, 4 Ben. 138; The McIlvane, 126 Fed. 434. *Cf.* The Loch Trool, 150 Fed. 429.

[57] The Venus, 17 Fed. 925; The Havilah, 50 Fed. 331, 1 C. C. A. 519; The Hamill, 100 Fed. 509.

§ 593. Earnings of the vessel.

No compensation can be recovered for the loss of uncertain and contingent profits;[58] but the net earnings of which the vessel is certainly deprived during the repairs, may be considered,[59] for the value of the use of the vessel during her detention is the measure of damages on account of the detention.[60] This may be measured by the cost of substituting a similar vessel;[61] and though this may be a spare vessel owned by the

[58] *United States:* Smith *v.* Condry, 1 How. 28, 11 L. ed. 35; The Vaughan and Telegraph, 2 Ben. 47; The Ocean Queen, 5 Blatch. 493; The Saginaw, 95 Fed. 403 (no loss); Fisk *v.* City of New York, 117 Fed. 885; The Loch Trool, 150 Fed. 429.

Delaware: Steamboat Co. *v.* Whilldin, 4 Harr. 228; Cummins *v.* Presley, 4 Harr. 315.

Louisiana: Minor *v.* The Picayune, 13 La. Ann. 564.

England: The Clarence, 3 W. Rob. 283.

[59] *United States:* Williamson *v.* Barrett, 13 How. 101, 14 L. ed. 68; The Conqueror, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. 510; The Rhode Island, 1 Abb. Adm. 100, 2 Blatch. 113; The M. M. Caleb, 10 Blatch. 467; The Narragansett, Olcott, 388; Vantine *v.* The Lake, 2 Wall., Jr., 52; The Venus, 17 Fed. 925; The James A. Dumont, 34 Fed. 428; Coffin *v.* Osceola, 34 Fed. 921; New Haven S. B. Co. *v.* Mayor of New York, 36 Fed. 716; The Cayuga, 59 Fed. 483; The Armonia, 81 Fed. 227; The Providence, 98 Fed. 133, 38 C. C. A. 670; The Cumberland, 135 Fed. 234. See, however, Orhanovich *v.* The America, 4 Fed. 337; The Silica *v.* The Lord Warden, 30 Fed. 845; The Columbia, 109 Fed. 660, 48 C. C. A. 596.

England: Heard *v.* Holman, 19 C. B. (N. S.) 1; The Argentino, 14 App. Cas. 519; The Black Prince, Lush. Adm. 568; The Gazelle, 2 W. Rob. 279; The Inflexible, Swabey, 200.

A similar rule prevails in the common law courts, Shelbyville L. B. R. R. *v.* Lewark, 4 Ind. 471; as also in the analogous case of the detention of a vessel by an unlawful obstruction to the navigation. Jolly *v.* Terre Haute D. B. Co., 6 McLean, 237.

In The Cayuga, 59 Fed. 483, 8 C. C. A. 188, 16 U. S. App. 577, 585, the case of a barge towed by a tug owned by the same owners, it was alleged that there was a custom to deduct as towage expenses one-third the gross earnings in order to find the net earnings; but the court held that only the actual expense should be deducted, since such a custom would apply only to towage by a stranger.

[60] *United States:* Williamson *v.* Barrett, 13 How. 101, 14 L. ed. 69; The Gorgas, 10 Ben. 666; The Mayflower, 1 Bro. Adm. 376; The Colorado, 1 Bro. Adm. 411; The Stromless, 1 Low. 153; The Belgenland, 36 Fed. 504; The Sanford, 37 Fed. 148; American-Hawaiian S. S. Co. *v.* Morse D. D. & R. Co., 169 Fed. 678.

New York: Mailler *v.* Express Propeller Line, 61 N. Y. 312.

England: The Star of India, 1 P. D. 466.

[61] *United States:* The Cayuga, 14 Wall. 270, 20 L. ed. 828; The Favorita, 18 Wall. 598, 21 L. ed. 856; The Emma Kate Ross, 50 Fed. 845; The North Star, 140 Fed. 263.

England: The Marpessa, [1907] A. C. 241, 76 L. J. P. 128, 97 L. T. 1, 10 Asp. M. C. 464 (*semble*).

libellant, the fact is no reason for withholding the value of its use.[62] The average net earnings of the injured vessel may be shown, as evidence of the value of her use,[63] and so may the amount paid for her use in an existing charter-party;[64] but the rate of demurrage named in the charter-party being *res inter alios* is not evidence of the value of her use.[65] In the absence of direct evidence of earnings, it has been said that interest on value of the vessel may be allowed for the time occupied in repairing.[66]

The allowance must not extend beyond the time necessarily lost;[67] but if the damage was such as to make it reasonable to go into port for repairs before proceeding with the voyage, the loss of time thereby caused may be compensated.[68]

§ 594. Total loss.

If the injured vessel is a total loss, her market value at the time will be the criterion of damages.[69] Where the vessel was a total loss, and was raised at an expense of $1,000, it was held that this sum, less the amount for which the wreck was sold, could be recovered, as it could only be ascertained by raising the vessel that she was a total loss.[70] But if it would cost more to raise a sunken vessel than the wreck would be worth, the plaintiff can recover as for a total loss without raising her.[71] Freight which the injured ship is deprived of earning

[62] See *ante*, § 243*a*. But see The William M. Hoag, 101 Fed. 846.

[63] Williamson *v.* Barrett, 13 How. 101, 14 L. ed. 69; The Potomac *v.* Cannon, 105 U. S. 630, 26 L. ed. 1194; The State of California, 54 Fed. 404; The Bulgarian, 83 Fed. 312; The North Star, 140 Fed. 263; The Tremont, 161 Fed. 1.

[64] The Providence, 98 Fed. 133, 38 C. C. A. 670; Christie *v.* Fane S. S. Co., 159 Fed. 648.

[65] The James A. Dumont, 34 Fed. 428; The Hermann, 4 Blatch. 441; The Silica *v.* The Warden, 30 Fed. 845. But see The America, 4 Fed. 337; The Columbia, 109 Fed. 660; Société des Voiliers *v.* Oregon R. & N. Co., 178 Fed. 324.

[66] The Rhode Island, 2 Blatch. 113; Great Lakes Towing Co. *v.* Kelley I. L. & T. Co., 176 Fed. 492, 100 C. C. A. 108.

[67] The Thomas Kiley, 3 Ben. 228; Seabrook *v.* Raft of R. R. Cross-ties, 40 Fed. 596.

[68] Comerford *v.* The Melvina, 43 Fed. 77.

[69] The Ann Caroline, 2 Wall. 538, 17 L. ed. 833; The Umbria, 166 U. S. 404, 41 L. ed. 1053, 17 Sup. Ct. 610; The Rebecca, Blatch. & H. 347; The New Jersey, Olcott, 444.

[70] The Mary Eveline, 14 Blatch. 497; *acc.*, The Empress Eugenie, Lush. Adm. 138; The Oneida, 84 Fed. 716.

[71] Blanchard *v.* New Jersey S. B. Co. 59 N. Y. 292.

on account of the collision, less the charges and expenses which would have been incurred in order to earn it, may always be recovered;[72] but nothing is allowed in case of total loss for loss of use or of profits, interest on the value of the vessel alone being recoverable.[73]

§ 595. Value of the vessel.

In The Granite State [74] it was said that there is no established market value for boats, barges, and other articles of that description, as in the case of grain, cotton, or stock, and their loss cannot be measured by the ratio of their profits, since the loss of an old hulk of little value, which was making or might make considerable profits, might be supplied at a price much less than one proportioned to such profits. In the absence of a market, resort may be had to the judgment of persons acquainted with the business and values involved;[75] if there is a market value that governs.[76] In Blanchard *v.* New Jersey Steamboat Co.[77] it was held, that evidence of the value of other vessels, with which the plaintiff's vessel could be compared, was not admissible to prove the value of the plaintiff's vessel. In The City of Alexandria [78] it was held that, there being no market value, the cost of the vessel might be shown as some evidence of value.[79] Ability to earn a statutory bounty is an element of value to be considered.[80]

§ 596. Damage to cargo.

The damages to the cargo are to be made good.[81] Where it

[72] The Golden Grove, 13 Fed. 674; The Utopia, 16 Fed. 507; La Champagne, 53 Fed. 398. *Cf.* The Havener, 50 Fed. 232; The Belgenland, 36 Fed. 504.

[73] The Umbria, 166 U. S. 404, 41 L. ed. 1053, 17 Sup. Ct. 610; The Roby, 103 Fed. 328; Smith *v.* Booth, 112 Fed. 553. *Cf.* Pennell *v.* The United States, 162 Fed. 64.

[74] 3 Wall. 310, 18 L. ed. 179.

[75] The Transit, 4 Ben. 138; The Emilie, 4 Ben. 235.

[76] The Colorado, 1 Bro. Adm. 411; The Hall, 128 Fed. 815; The Mobila, 147 Fed. 882.

[77] 59 N. Y. 292.

[78] 40 Fed. 697.

[79] The Lee, 24 Fed. 483; The Ant, 13 Fed. 91; The Bell, 5 Hughes, 172, 3 Fed. 581; The Gazelle, 33 Fed. 301; The Dimmock, 77 Fed. 226; The Trudeau, 54 Fed. 907, 4 C. C. A. 654, 2 U. S. App. 596; The Lucille, 169 Fed. 719; La Normandie, 58 Fed. 427, 7 C. C. A. 285.

[80] The Bell, 5 Hughes, 172, 3 Fed. 581; The Gazelle, 33 Fed. 301; Cunard S. S. Co. *v.* Fabre, 53 Fed. 288, 3 C. C. A. 534, 1 U. S. App. 614; The Dimmock, 77 Fed. 226.

[81] The Narragansett, Olcott, 388; La Normandie, 58 Fed. 427, 7 C. C. A. 285 (personal baggage of a passenger).

is a total loss, its value is the measure.[82] This value, it has been held in a comparatively early case, in analogy to the rule in the case of carriers, was to be estimated at the port of destination, at the time when, in the ordinary course of things, it would have been delivered.[83] But by the rule now prevailing, it seems settled that the value must be taken at the port of shipment, and on this sum interest may be allowed; [84] also the expense of lading the cargo and transporting it to the place of collision.[85] This corresponds to the rule in prize cases.[86] So in Dyer *v.* The National Steamship Co.,[87] the Republic of Peru, as co-libellant, claimed damages for the loss of a cargo of guano through the collision of the libellant's vessel with a vessel belonging to the respondent. The sale of guano was a monopoly belonging to the government of Peru. The guano was exported by the government, and its exportation by other parties was prohibited. Peruvian subjects were allowed to dig the guano for use in Peru alone. A little of it so dug was sold in Peru for $12 a ton, gold, but subject to the limitation that it should not be exported. Beyond this, there was no market for it in Peru. The cargo was lost just outside the harbor of New York. If it had arrived in New York, it would have sold for $60 a ton, in gold. Benedict, J., admitting the general rule above stated, held the principle of indemnity was a higher law to which the general rule must yield; that resort to the latter in this case would violate the former, and that, therefore, the value at New York, less the costs and charges which would have been incurred from the time and place of the loss to its arrival in New York, must be taken in determining the loss to the Republic of Peru. But on appeal to the Circuit Court, this de-

[82] Porter *v.* Allen, 8 Ind. 1.

[83] The Joshua Barker, Abb. Adm. 215.

[84] Smith *v.* Condry, 1 How. 28, 11 L. ed. 35; The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Bell, 3 Fed. 581; The City of New York, 23 Fed. 616; The Umbria, 59 Fed. 489, 11 U. S. App. 612, 8 C. C. A. 194.

[85] The Vaughan & Telegraph, 2 Ben. 47; The Ocean Queen, 5 Blatch. 493.

If a vessel carrying her owner's goods is lost, he cannot recover, as for freight; because if expectation of enhanced value cannot be considered as to goods, the same is true as regards the loss of the ship. Crowell *v.* The Beatrice Havener, 50 Fed. 232.

[86] The Amiable Nancy, 3 Wheat. 546, 560, 4 L. ed. 456; The Lively, 1 Gall. 315; Atlas S. S. Co. *v.* The Colon, 4 Fed. 469, 18 Blatch. 277.

[87] 7 Ben. 395. See also The Aleppo, 7 Ben. 120; The Hugo, 61 Fed. 860.

cision was reversed, on the ground, as stated by Blatchford, J., that the value at the place of loss should not include the profits to be realized by transmitting the cargo to the point of destination.[88]

Expenses incurred by the master in minimizing the damage cannot be recovered, since they enure to his own advantage.[89]

§ 596a. Negligent injury to cargo—The Harter Act.

Prior to the passage of the Harter Act [90] the responsibility of the ship for due care in relation to the cargo was governed by principles substantially the same as in the case of any other carrier. In recent times, however, it had become usual to insert in bills of lading stipulations limiting the liability of the vessel for negligence, in the case of losses caused by unseaworthiness, bad stowage, negligence in navigation, etc.; and these stipulations had been held in England, if not in this country, to be valid contracts, in some cases even when they exempted the ship from the consequences of her own negligence.[91] Under these circumstances Congress passed the act of Feb. 13, 1893, entitled "an act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property." It may be regarded as a compromise between the attempt on the one

[88] 14 Blatch. 483, 490. Two cases in which the value at the port of destination was allowed were distinguished, on the ground that there was no value at the place where the cargo had been taken on board. Bourne *v.* Ashley, 1 Low. 27 (whale converted in Okhotsk Sea); Swift *v.* Brownell, 1 Holmes, 467 (oil and bone lost by collision in Arctic Ocean).

[89] Ralli *v.* New York & T. S. S. Co., 154 Fed. 286, 82 C. C. A. 290.

[90] 27 U. S. Stat. 445, c. 105.

[91] The Delaware, 161 U. S. 459, 471, 40 L. ed. 771, 16 Sup. Ct. 516. *Cf.* Compania de Nav. La Flecha *v.* Brauer, 168 U. S. 104, 117, 42 L. ed. 399, 18 Sup. Ct. 12; Knott *v.* Botany Mills, 179 U. S. 68, 71, 45 L. ed. 90, 21 Sup. Ct. 30.

In The Delaware, *supra*, at p. 472, the court said:

"As decisions were made by the courts from time to time, holding the vessel for non-excepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand and suggested amendments to the maritime law in line with those embodied in the Harter Act." The opinion contains extracts giving illustrations of the burdensome character of these stipulations.

hand to exempt the vessel from all liability, and the strict rule of liability on the other.

The first section makes null and void stipulations relieving the vessels engaged in foreign trade or their owners from liability in case of negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of goods. The second section declares it to be unlawful to avoid, or limit the obligation of the owner to exercise due diligence to properly equip, man, provision and outfit the vessel, to make her seaworthy, to carefully handle and stow her cargo, and to care for and properly deliver the same. The third section, introducing a wholly new principle, provides that, if the owner shall exercise due diligence to make her seaworthy, "neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting *from faults or errors in navigation or in the management of said vessel,* nor shall they be liable for losses arising from damages of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of packages, or service under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.[92] In The Viola [93] this statute came before the District Court for the Southern District of New York. Brown, J., held that there was no intention on the part of Congress to legislate generally with reference to rights and liabilities growing out of collisions, and that the act was designed to deal solely with the carrying vessel and her own cargo. The two fundamental principles already established, that the innocent cargo owner may recover in full from either vessel, and that each vessel in fault shall bear an equal portion of the whole loss, must still be applied, so far as compatible with the new act. The statute imposes modifications upon both sides as applied in particular instances. "The owner of the carrier vessel being no longer liable for the losses sustained by her own

[92] For the proper construction of the act, see Knott *v.* Botany Mills, 179 U. S. 68, 45 L. ed. 90, 21 Sup. Ct. 30; Int. Nav. Co. *v.* Farr & Barley Mfg. Co., 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. 591.

[93] 59 Fed. 632, 634, 60 Fed. 296.

cargo through faults in her navigation, is not bound to admit, in case of her total loss, of any offset in favor of the other vessel for the half of what the latter may be bound to pay on account of the cargo of the former, and this introduces an important modification of the moiety rule as heretofore administered."

On the other hand, there is no reason to suppose that it was the intention of Congress to relieve the carrier vessel of the expense of the other vessel in collision cases, that is, to add to the liability of the latter. To avoid this, the act must be held to mean that so much of the cargo loss as would previously have been charged against the carrier vessel, shall now be borne by the cargo owner.

According to this decision the adjustment of loss in cases of collision by mutual fault is to be made upon the principle that neither vessel is to be charged with any greater aggregate since this Act than she would have been charged before, under like circumstances; that the losses of the two vessels themselves are first to be made even,[94] (including personal effects, which are treated as part of the vessel); that the carrying vessel cannot be charged with any part of the loss suffered by her own cargo directly, or indirectly, nor can any offset against her claim to damages be made by the other vessel on account of what the latter vessel must pay for that cargo damage; but that the same offset which would have been formerly allowed against the carrying vessel, or the moneys payable to her, must now be deducted from the claim of her cargo. "Under this construction the cargo owner, whenever the surviving vessel is of sufficient value, will always be paid at least one-half his loss, and sometimes in full; as when the damages to the cargoes of both vessels are equal."

Illustrations are given by the court. Vessels A and B are each damaged $10,000, and only A's cargo damaged—say $5,000. B pays $2,500. If A's loss were $2,000, and her cargo's $4,000; B's $8,000, and her cargo's $6,000, then B, after receiving $3,000 from A, should pay A's cargo in full, since that would not exceed half the aggregate loss; while A should pay B's cargo but $5,000, as this would reach A's limit of half the entire loss, and A could not offset against B's claim any further payment

[94] The North Star, 106 U. S. 17, 27 L. ed. 96, 1 Sup. Ct. 41.

to B's cargo. If the cargo losses had been $5,000 each, each would be paid in full.

If A and her cargo were each damaged $10,000, while B and her cargo sustained no damages, A's cargo loss might be required to be paid in full by B before equalizing the losses between the two vessels alone, if such payment could be lawfully offset by B against A's loss of $10,000. But as A is in no way responsible for any part of her own cargo loss, such payment by B cannot be availed of as an offset against A's claim for half her damage, and since B's aggregate liability should not be increased under the Act of 1893, the mode indicated in the case of The North Star [95] should be followed in such cases. These principles were applied in the case of The Viola. The loss of the libellants' vessel including freight and personal effects was about $5,930, of her cargo about $1,300 and these were total losses; the damage to The Viola was about $260, to her cargo nothing. The Viola had been sold, and her net proceeds amounted to about $3,440. On an adjustment of costs and fees, the claim of the libellant on his vessel's account against The Viola amounted to about $2,723, to equalize the loss between the two vessels. As no part of the cargo loss could be offset against the libellant, the cargo must bear one-half that loss itself; and the defendants the other half, this making up the amount the defendants would previously have been called upon to pay. The surplus, about $70, was decreed to belong to the defendant. In The Niagara [96] the principles laid down were still further explained by Brown, J., who said, "Upon any complication, the first inquiry is, to what amount was each vessel, or her owner, liable under the previous law, upon the particular facts of the case? Under the Harter Act, if it is applicable, that liability cannot be exceeded, and it will remain the same, if necessary to make good the damage to the cargo of the other ship. In getting at the amount which either vessel is to pay under the Harter Act, her own cargo is to be treated as non-existent, because when the Harter Act is oper-

[95] 106 U. S. 17, 27 L. ed. 96, 1 Sup. Ct. 41. As to the effect of the Harter Act on adjustments in general average, see The Irrawaddy, 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. 831; The Jason, 178 Fed. 414, 101 C. C. A. 628.

[96] 77 Fed. 329; *acc.*, The Rosedale, 88 Fed. 324.

ative the carrier vessel (A) is not liable for that item of damage. But the other ship (B) is bound to pay that item of cargo loss, as well as one-half the damage to the two ships up to the limit previously ascertained, as above stated, if the remaining value of the ship (B) and her pending freight are sufficient for that purpose. When this value is not sufficient, and the damage to the first vessel (A) is greater than the damage to the other ship (B) two conflicting claims arise, one in favor of the ship (A) for the purpose of equalizing the loss of the two vessels, and another claim for the loss on (A's) cargo. As those claims arise at the same time and are of equal merit, the remaining value of the ship (B) and her pending freight should be apportioned *pro rata*, according to the amount of the two claims." [97]

When both vessels are in fault, and one is sunk, with her cargo, the cargo owner has the superior lien for reparation; that of the owner, or charterer is subordinate.[98] Claims of officers and crew of a vessel in fault are also subordinate to those of the cargo owner.[99]

§ 597. Costs.

Costs in Admiralty are under the control of the court. They are sometimes, on equitable considerations, denied to the party who prevails, and they are sometimes given to an unsuccessful libellant, who has been misled by the other party. Generally, they follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence lead the court to depart from that rule in a great variety of cases.[100]

§ 597a. Interest.

The general principles governing the allowance of interest do not differ from those applied by courts of law.[101] Rule 23 of

[97] Injuries to passengers, and claims for loss or damage to their personal baggage are not within the exemptions of the first clause of the third section of the act. Such claims, therefore, can be proved against both vessels. The Rosedale, 88 Fed. 324; *In re* California N. & I. Co., 110 Fed. 678.

[98] The George W. Roby, 103 Fed. 328, 49 C. C. A. 481.

[99] The George W. Roby, 103 Fed. 328, 336, 49 C. C. A. 481.

[100] The Sapphire, 18 Wall. 51, 21 L. ed. 814. For recovery of premium for bond to secure discharge of vessel see The Europe, 175 Fed. 596.

[101] *United States:* The Swallow, Olcott, 334; The James A. Dumont, 34 Fed. 428; The John H. Starin, 116 Fed. 433; The Hamilton, 95 Fed. 844; The

the Supreme Court provides that "in cases in Admiralty, damages and interest may be allowed if specially directed by the court," and it has been said [102] that this "leaves the matter to the sound discretion of the court." [103] But there is nothing arbitrary about this discretion. The main difference between the allowance of interest at law and in Admiralty is that in the latter there is no question of the jurisdiction over the matter respectively by court and jury. In collision cases, when damages are given for detention, interest may be allowed as damages, though the demand is evidently unliquidated before suit brought.[104] Where demurrage is stipulated for day by day, and daily demanded for every day's detention, interest on it must be allowed.[105] In collision cases, however, notwithstanding the decision in The Alexandria [106] there would seem to be ordinarily no reason for allowing interest.[107]

In Hemmenway *v.* Fisher [108] it was said that the rate of interest in Admiralty should be uniform, and not vary with the law of the States.[109]

§ 598. Stipulations.

The judgment in Admiralty cannot generally exceed the amount of the stipulation given for the discharge of the vessel, for that is all that is within the jurisdiction of the court.[110]

Oregon, 89 Fed. 697; The Rabboni, 53 Fed. 948; The Illinois, 84 Fed. 697; The Celestial Empire, 11 Fed. 761; The Switzerland, 67 Fed. 617.

England: The Hebe, 2 W. Rob. 530.

[102] New Zealand Ins. Co. *v.* Parnmoor S. Co., 79 Fed. 368, 24 C. C. A. 644, 48 U. S. App. 245.

[103] Dyer *v.* National S. N. Co., 118 U. S. 507, 30 L. ed. 154, 6 Sup. Ct. 1174; The North Star, 44 Fed. 492; The Syracuse, 97 Fed. 978; The Alaska, 44 Fed. 697; The Itaska, 117 Fed. 885; The Mahoney, 127 Fed. 773; The Eagle Point, 136 Fed. 1010; The Rickmers, 142 Fed. 305; The North Star, 140 Fed. 263.

[104] The Natcher, 78 Fed. 183, 24 C. C. A. 49, 41 U. S. App. 708; The Kalbfleisch, 59 Fed. 198; The Gilchrist, 173 Fed. 666. In salvage cases, when exaggerated claims are made, interest may be disallowed. Merritt & C. D. & W. Co. *v.* Chubb, 113 Fed. 173, 51 C. C. A. 119.

See, however, The Strong, 156 Fed. 427.

[105] 35,000 boxes of Oranges and Lemons, 14 U. S. App. 562, 57 Fed. 236, 16 C. C. A. 317.

[106] 10 Ben. 101.

[107] Johanson *v.* The Bark Storia, 4 Fed. 573.

[108] 20 How. 255, 15 L. ed. 799.

[109] This view was adhered to, and six per cent allowed, in The Oregon, 89 Fed. 520. And this is the rate of interest usually allowed in the Southern District of New York. The Aleppo, 7 Ben. 120.

[110] The Webb, 14 Wall. 406, 20 L. ed. 774.

And a stipulator, unless personally guilty of default or contumacy, cannot be held liable for more than the amount of his stipulation; even on appeal, the costs recoverable are limited to the stipulation for costs and the appeal bond.[111] The stipulated sum cannot be increased by the allowance of interest.[112] The stipulation may, however, expressly provide for interest. in which case it is reasonable.[113]

§ 599. Personal injury—Division of loss.

A vessel is liable for personal injuries (including loss of life, within Lord Campbell's act), which are the natural and proximate consequence of a collision.[114] So where the plaintiff's wife is killed by a collision between two vessels, he can recover against the vessel in fault by proceeding *in rem*.[115] The common law rule that no action lies for the death of a human being is held in the United States to be a rule of general maritime law.[116] Action may, however, be brought in a United States court on a State statute; but the damages for death, though unlimited by the State Constitution, may in collision cases be limited by Federal statutes, proportioning recovery to the owner's interest in the vessel—and the State courts will enforce the Federal limitation.[117]

The rule of division of loss is now held to apply to the case of personal torts.[118] As a result, a party suing in an admiralty court for any tort, though he was guilty of contributory negligence, is allowed to recover for a portion of his loss.

So in McCord *v.* The Tiber,[119] The Tiber having got aground,

[111] The Wanata, 95 U. S. 600, 24 L. ed. 461.

[112] Hemmenway *v.* Fisher, 20 How. 255, 15 L. ed. 799; The Ann Caroline, 2 Wall. 538, 17 L. ed. 833; The Favorite, 12 Fed. 213; *In re* Harris, 57 Fed. 243, 6 C. C. A. 320; The Battler, 58 Fed. 704; Smith *v.* Booth, 112 Fed. 553.

A few cases sometimes cited to the contrary: The Ann Caroline, 2 Wall. 538, 17 L. ed. 833; The Wanata, 95 U. S. 600, 24 L. ed. 461; The Manitoba, 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. 1158: are distinguished by Lacombe, J. in his learned opinion, *In re* Harris, 57 Fed. 243, 6 C. C. A. 322.

[113] The George W. Roby, 111 Fed. 601, 49 C. C. A. 481.

[114] The George and Richard, L. R. 3 Adm. 466, 24 L. T. R. 717.

[115] The Sea Gull, Chase, 145.

[116] The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. 140; Rundell *v.* C. G. Transatlantique, 100 Fed. 655, 49 L. R. A. 92.

[117] Loughin *v.* McCauley, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33.

[118] The Oregon, 45 Fed. 62; The City of Norwalk, 55 Fed. 98; The Wilson, 84 Fed. 204; Jakobson *v.* Springer, 87 Fed. 948.

[119] 6 Biss. 409. In this case, the

a line was stretched across the main channel of the river to aid in getting her off. The plaintiff was piloting a raft down the river, and was struck in the back by the rope, and injured. It was held that both parties were in fault. The court said: "When both parties are in fault, the court apportions the damages between them, according to justice and equity, having due regard to the degree of negligence imputable to each; so that, in admiralty, a party in fault may recover of another party whose negligence contributed to cause the injury, a portion of the damages, while, at common law, a defendant must pay all damages, or none." So where by a collision between vessels mutually at fault a seaman or officer on one of the vessels is injured, he may recover compensation from the other vessel, but only for half his loss.[120]

But though the right of the injured party to recover a portion of his loss is settled, the application of the rule of equal division, which prevails in collision cases, is doubtful. It has often been decided that "the damages should be divided," as has been seen; but this phrase does not necessarily mean that the division must be equal. The whole subject has been recently reviewed by the Supreme Court of the United States in an exhaustive opinion of Blatchford, J.[121]

The suit was brought in the District Court for the Southern District of New York by the libellant against the steamer Max Morris, to recover damages for a personal injury while employed on the vessel in loading coal. In the District Court, Brown, J., entered a decree for the libellant, and on appeal, the opinions of the judges being in conflict, the question whether the libellant was entitled to "divided damages" was certified to the Supreme Court. The court found, as a matter of fact, that the injuries to the libellant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel.

The Supreme Court in deciding the case, refused to entertain the question whether the damages were to be equally

plaintiff was 47 years old, and had a family of five children. The accident disabled him from following his business as a pilot. It was held that he was entitled to $2,500.

[120] The Queen, 40 Fed. 694.

[121] The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. 29, affirming 24 Fed. 860, 28 Fed. 881, 24 Blatch. 124.

divided, holding that the only question presented by the certificate was whether the libellant was debarred from the recovery of any sum of money by reason of the fact that his own negligence contributed to the accident, although there was negligence also on the other side, and this question was decided in favor of the libellant, the court adding, "whether in a case like this the decree should be for exactly one-half of the damages sustained or might in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

The court refers to several cases in which the rule of the equal division of damages has been extended to claims other than those for damages to vessels in fault in collision,[122] and on the question before it refers to a number of cases in the lower courts of the United States, all of them cases in Admiralty, as showing "an amelioration of the common law rule, and an extension of the admiralty rule in a direction which is eminently just and proper. . . . As stated by the district judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, when their fault is clear, provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and when the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and presented in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." [123]

[122] The Washington, 9 Wall. 513, 19 L. ed. 787; Atlee *v.* Packet Co., 21 Wall. 389, 22 L. ed. 619; The Alabama, 92 U. S. 695, 23 L. ed. 763; The Atlas, 93 U. S. 302, 23 L. ed. 863; The Juniata, 93 U. S. 337, 23 L. ed. 930.

[123] *Acc.*, The Frey, 113 Fed. 1003. *Cf.* The Explorer, 20 Fed. 135; The Wanderer, 20 Fed. 140; The Truro, 31 Fed. 158; The Eddystone, 33 Fed. 925; Olson *v.* Flard, 34 Fed. 477; Keiley *v.* The Cypress, 55 Fed. 332; William

As to the question, assuming that the loss is to be divided, what the rule of division is to be, the court refers to the ground of the rule for an equal division being the difficulty of determining in such cases, the degree of negligence on one side or the other. It is called by Cleirac [124] a *rusticum judicium i. e.*, a sort of rule of thumb. But either this rule must be adopted, or the whole matter must be left to the discretion of the court. This seems to be the rule adopted by the District Court of Oregon, which holds that the court will apportion the damages "according to principles of equity and justice, considering all the circumstances of the case." [125]

In the absence of an authoritative decision by the court of last resort, the rule cannot be yet regarded as definitely settled, though all the considerations in favor of the equal division of the loss in one class of cases would seem to apply in all.

§ 599a. Nominal damages in admiralty.

It is said that in Admiralty, a decree for nominal damages is never given, for the following reasons: 1st, because costs being discretionary, nominal damages cannot be requisite to support them; 2d, because they are not called for, as in some cases they are at common law to establish the existence of a right in the plaintiff.[126]

§ 599b. Exemplary damages.

Exemplary damages are awarded in Admiralty, as in other jurisdictions.[127]

In The William H. Bailey [128] it is said that they do not seem to have been allowed in any case in a proceeding *in rem;* and that in the English Admiralty the fact that the damage was caused by the wilful act of the master is sufficient reason for dismissing the libel. Generally, of course, when the dam-

Johnson & Co., Ltd., *v.* Johanson, 30 C. C. A. 675, 86 Fed. 886.

[124] Us et Coutumes de la Mer, 68.

[125] Olson *v.* Flard, 34 Fed. 477.

[126] Barnet *v.* Luther, 1 Curt. 434; Herbst *v.* The Asiatic Prince, 97 Fed. 343, 345; Munson *v.* Straits of Dover I. S. Co., 99 Fed. 787, 792; *In re* California N. & I. Co., 110 Fed. 670, 678.

[127] The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; Gallagher *v.* The Yankee, 9 Fed. Cas. No. 5,196, Hoff. 456; The Yankee *v.* Gallagher, 30 Fed. Cas. No. 18,124, McAll. 467. Such damages cannot be awarded unless the owner is personally in fault. The Seven Brothers, 170 Fed. 126.

[128] 103 Fed. 799.

age is caused by a wilful act, it will be that of those engaged in the actual navigation of the vessel, and not that of the owner, who is the person responsible in a proceeding *in rem;* but if the owner himself is master, or authorizes the act, no reason is perceived why he should not be responsible in exemplary damages, whether the proceeding is *in rem* or *personam.*

§ 599c. Salvage.

Salvage is a claim peculiar to the law of Admiralty. It is never awarded in a court of common law, in which the nearest analogy is recovery on a *quantum meruit.*[129] It is an allowance made to persons by whose assistance a ship or boat, cargo, or other property is saved from danger or loss at sea. It is not prize-money, nor is it mere compensation for services; but is a reward for the hazard undertaken.

The elements on which the amount of salvage is based are generally stated as follows: [130]

1. The enterprise of the salvors in assisting a vessel in distress and the risk they take with their own lives and property of others.

2. The degree of danger and distress from which property is rescued, whether it was in imminent peril and almost certainly lost if not at the time rescued.

3. The degree of labor and skill shown, the time occupied.

4. The amount of property saved.

In order to justify the allowance of salvage, two elements must have been present; the absence of either prevents the allowance of salvage, and restricts the libellant to compensation for services rendered. These elements are danger [131] and success.[132] If the services were rendered at request salvage may be given, but it will be on a less liberal scale.[133]

[129] *Georgia:* Anthanissen *v.* Dart, 94 Ga. 543, 20 S. E. 124.

New York: Sturgis *v.* Law, 3 Sandf. 451.

[130] Taylor *v.* The Friendship, Bee, 175; McGinnis *v.* The Pontiac, 5 McLean, 359; Murphy *v.* Ship Suliote, 5 Fed. 99; Murray *v.* U. S., 55 Fed. 829, 5 C. C. A. 283; The Lamington, 86 Fed. 675, 30 C. C. A. 271; Wilder's Co. *v.* Lurline, 11 Hawaii, 83.

[131] Murray *v.* U. S., 55 Fed. 829. *Cf.* U. S. *v.* Morgan, 99 Fed. 570, where the risk existed, though it was slight, and salvage was awarded.

[132] Clark *v.* The Dodge Healey, 4 Wash. C. C. 651; Anderson *v.* The Edam, 13 Fed. 135.

[133] Wilmington Transportation Co. *v.* The Old Kensington, 39 Fed. 496.

The amount of salvage is entirely within the discretion of the court, and no rules can be laid down for its measure. At one time it was said that it should never exceed one-half the value of the property salved:[134] but in extreme cases salvage has been allowed at a higher rate.[135] It is often said that one-half the value is to be allowed for salving a derelict;[136] but even in this case there is no absolute rule beyond "enlarged discretion."[137] Where the danger to the property salved was great, and the services were attended with risk, or great exertions, the allowance is usually from one-third to one-half;[138] where the salvage is of a "low order" less than one-third is customary.[139] The amount of salvage is sometimes regulated by statute.[140]

[134] Cross *v.* The Bellona, Bee, 193; British Consul *v.* Smith, Bee, 178; Smith *v.* The Stewart, Crabbe, 218.

[135] Llewellyn *v.* Two Anchors, 1 Ben. 80.

[136] Hindry *v.* The Priscilla, Bee, 1; Sprague *v.* Barrels of Flour, 2 Story, 195. And see Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. 127; Gardner *v.* Ninety-nine Gold Coins, 111 Fed. 552.

[137] Post *v.* Jones, 19 How. 150, 15 L. ed. 618.

[138] See Tyson *v.* Pryor, 1 Gall. 133 (1/3); Montgomery *v.* The T. P. Leathers, 1 Newb. 421 (1/3); Bearse *v.* Pigs of Copper, 1 Story, 314 (2/5).

In Serviss *v.* Ferguson, 84 Fed. 202, 28 C. C. A. 327, the vessel was salved and brought into the dock, and while there she was destroyed by the negligence of the salvors. The salvors were awarded one-third of the value, and were then decreed to pay her whole value less the amount of salvage.

[139] See Crowell *v.* The Brothers, Bee, 136 (about 3/16); Blagg *v.* The Bicknell, 1 Bond, 270 (15%); Mattingly *v.* Colton, 2 Flip. 288, Fed. Cas. No. 9,294 (1/3 set aside); Bowley *v.* Goddard, 1 Low. 154 (51/2%); Studley *v.* Baker, 2 Low. 205 (1/4); Lee *v.* The Alexander, 2 Paine, 465 (1/15); United States *v.* Morgan, 99 Fed. 570.

[140] Talbot *v.* Seeman, 1 Cr. 1, 2 L. ed. 1 (1/8 to 1/2 for recapture).

CHAPTER XXVII

DAMAGES IN ACTIONS ON CONTRACTS

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I.—General Principles

§ 600. Actions upon contracts.

Having thus considered the general rules which govern and limit compensation in all cases, and the particular rules applicable in actions founded on tort, we now proceed to consider the great class of cases relating to actions founded on breach of contract. These actions generally grow out of negotiable paper, policies of insurance, the sale and warranty of chattels, contracts of agency, service, suretyship, or other express executory agreements, written or verbal, as well as those implied contracts where the law implies a quasi-contractual liability from the acts of the parties. These subjects will be considered separately; but before doing so, it will be necessary to state the general rules upon which the English and American law proceed in all cases *ex contractu*—rules which are themselves dependent upon and will be frequently found to throw additional light upon those great general principles as to certainty, remoteness, and other limits of recovery which lie at the root of our whole system of compensation.

In the present chapter contracts relating to real estate will

not be considered. Although these are governed by the same general principles which affect all contracts, these principles are in the field of real estate more obscured by rules drawn from or affected by the feudal law. Understanding first the broad principles by which damages on any ordinary breach of contract are measured, we shall be the better prepared to comprehend a more complex and arbitrary system.

§ 601. Distinction between tort and contract.

* It was the constant and sedulous object of the common law to draw a distinct line between actions of contract and those of tort, *ex contractu* and *ex delicto;* and the rigor with which this distinction was maintained in regard to joinder of counts, causes of action, and election of actions, is familiar learning.**

* Again, as to the rules of evidence, while it is perfectly true that in actions of tort every attendant circumstance of aggravation can be given in evidence: on the other hand, nothing is better settled than that in actions of contract the parties are limited to the mere evidence of the breach of contract. But if damages are to be awarded on account of the oppressive, malicious, or fraudulent conduct of the defendant, it is manifest that this rule cannot be maintained; if one party gives evidence of such a character, it is plain that the other must have the right to rebut the testimony, and in this way the form of the action, the issue *ex contractu*, and the rules of testimony, would be completely lost sight of. If, at the trial, the evidence of a breach of contract were complete, certainly an offer to show that the defendant's act was dictated by a malicious, fraudulent, or oppressive spirit, would not be allowed; and it is very clearly inadmissible to consider, as in evidence for the purpose of regulating the damages, testimony incidentally introduced, which could not be directly given.**

§ 602. Distinction not destroyed by new system of pleading.

The modern system of pleading under which the old forms of action have disappeared might perhaps be expected in time to destroy the distinction between tort and contract. But there are many reasons for not anticipating this. No doubt in many cases,—*e. g.*, cases against carriers,—it is now often

impossible to tell from the pleadings whether the proceeding sounds in tort or contract; but the breach of the contract here is of a peculiar kind. The contract is one made in pursuance of a public duty imposed upon the carrier; his breach of contract is therefore here in a certain sense a tort, at least in many cases. But the inherent difference between a breach of an agreement between parties, and that sort of a breach of duty which we call a tort, is as old as the law itself. It is believed, too, that as a general rule the measure of damages in one case is necessarily different from the measure of damages in the other. To put the plaintiff in the same position as if the contract has not been broken is the object in cases of contract; whether the contract is broken by accident or by fraud can make no difference. As long as the action is brought to obtain compensation for the *loss of the contract*, the circumstances attending the breach cannot affect the result. But if the cause of action is a tort, the plaintiff must obtain full compensation for an *act* or *series of acts*, the full effect of which cannot even be understood unless we know every circumstance of aggravation and mitigation. The action for breach of promise of marriage is an undoubted exception to the truth of this general observation; but this action is an anomaly in every respect, and unknown to other systems of law. It may be said that redress should be given for bringing about a breach of contract through duress, or fraud, or other oppression, and so we conceive it would; but in such an action, the damages for the loss of the contract would be one thing, and the damages for the wrong another.[1]

§ 603. Motive not considered: Exemplary damages.

It may be considered then to be established that the motives of the defendant in breaking his contract are to be disregarded. It follows from this principle that exemplary damages

[1] The rule of intervening cause produces a different result in tort and contract. In the former, the operation of the intervening cause may affect the right of action, and prevent any recovery; in the latter, where there is a breach of contract, but the intervening cause is the one to which loss is due, the plaintiff still recovers, though only a nominal sum. For an example, *cf.* Lowery *v.* W. U. T. Co., 60 N. Y. 198, 19 Am. Rep. 154, with First Natl. Bank of Barnesville *v.* W. U. T. Co., 30 Oh. St. 555, 27 Am. Rep. 485.

cannot be recovered in an ordinary action for breach of contract.[2]

Like many other rules for determining the measure of damages, this has not always been recognized as law. At the beginning of the last century Chitty in his very valuable work on contracts [3] said that in certain cases, where the defendant might be regarded in the light of a wrongdoer in breaking his contract, great latitude might be allowed the jury in assessing the damages. The authority referred to by him [4] did not support the doctrine thus broadly stated; and although it received some support in American cases [5] it has been effectively disapproved in later cases.[6]

§ 604. Common law principles in cases of contract.

* "Damages are recoverable in every personal action which lies at the common law." [7] The language of the civil law is, *Loco facti impræstabilis succedit damnum et interesse.* We have already considered the subject of nominal damages and seen how far the courts go for the mere purpose of declaring a right. We are now to examine those cases of contract where substantial relief is demanded; and the two cardinal principles which will be found to pervade and regulate this branch of our

[2] *United States:* Grand Tower Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

Georgia: Ford *v.* Fargason, 120 Ga. 606, 48 S. E. 180.

Illinois: Toledo, W. & W. Ry. *v.* Roberts, 71 Ill. 540.

Massachusetts: Magnolia Metal Co. *v.* Gale, 189 Mass. 124, 75 N. E. 219.

Michigan: Johnson *v.* Henry, 127 Mich. 548, 86 N. W. 1027.

New York: Duche *v.* Wilson, 37 Hun, 519.

Pennsylvania: Westfall *v.* Mapes, 3 Grant, 198 (but see McDowell *v.* Oyer, 21 Pa. 417).

Wisconsin: Kelley, Maus & Co. *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674.

England: Bain *v.* Fothergill, L. R. 7 H. L. 158.

The rule appears to be otherwise in the following states:

Louisiana (a civil law jurisdiction). Green *v.* Farmers' Consol. Dairy Co., 113 La. 869, 37 So. 858.

South Carolina: Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Prince *v.* State M. L. I. Co., 77 S. C. 187, 57 S. E. 766.

Texas: Westfall *v.* Perry (Tex. Civ. App.), 23 S. W. 740; Ball *v.* Britton, 58 Tex. 57 (*cf.* Houston & T. C. R. R. *v.* Shirley, 54 Tex. 125).

[3] Page 684.

[4] Lord Sondes *v.* Fletcher, 5 B. & Ald. 835.

[5] Rose *v.* Beatie, 2 N. & McC. (S. C.) 538, 542; Garrett *v.* Stuart, 1 McC. (S. C.) 514; Ferrand *v.* Boushel, Harper (S. C.), 83.

[6] Hawkins *v.* Coulthurst, 5 B. & S. 343.

[7] Sayer on Damages, chap. 1, p. 6.

subject, are, *First*, that the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss; and, *Secondly*, that the contract itself furnishes the measure of damages. These two rules are closely interwoven with each other and it is impossible to consider them altogether separately. The first rule is one of great importance. It excludes a large class of cases in which relief is often sought before an injury has occurred; and we shall have frequent occasion to refer to it.** * This rule is, however, not without exception, as we shall hereafter see. The second rule, that the contract itself furnishes the measure of damages, is of equal importance. We have already adverted to it generally, but we have now to consider it more fully, and at the same time to notice such exceptions to it as may be found to exist.**

§ 605. Vague discretion of jury formerly.

* We have already had occasion to observe the vague discretion that in the early books is attributed to the jury in the matter of damages. Thus, as late as the reign of James I, where the plaintiff sued the defendant on a covenant that if certain land conveyed to him by the defendant fell short of a specified measurement, he, the defendant, would pay a fixed sum for every deficient acre, and alleged that the number of acres wanting would have amounted to the sum of £700, and the jury gave but £400 damages,—it was held, that this was well found; and it was said, "If *all* the land was wanting, *still the jury are chancellors*, and can give such damages as the case requires in equity." [8]

So even as late as the middle of the 18th century, in an action for escape against the sheriff, Lord C. J. Wilmot said that in actions on the case, the damages are "totally uncertain and at large." [9] So, a standard text-writer [10] uses this language:

"In all actions which sound in damages, the jury seem to have a discretionary power of giving what damages they think proper; for though in contracts the very sum specified and agreed on is *usually* given, yet if there are any circumstances of

[8] Sir Baptist Hixt's Case, 2 Roll. Abr. 703 (Trial pl. 9).

[9] Ravenscroft *v.* Eyles, 2 Wils. 295.

[10] Bacon Abr. Tit. Damages, D.

hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly; as in case upon a policy of assurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about £1,500 insured on it, and then the ship was voluntarily sunk."

There can be no stronger proof of the revolution that has been effected in this branch of our law, than is furnished by this citation. Here, even on promissory notes, the jury are said to have power to give a sum less than that expressed in them; and a contract which now the law would pronounce utterly void, is declared to be a matter for the mere discretion of the jury.**

§ 606. Compensation now a question of law.

* It is, in truth, but slowly and at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages. But, by degrees, the salutary principle has been recognized, and it is now well settled, that in all actions of contract, subject to the exception already noticed, and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.[11]

It is, in fact, indispensable that it should be so: the measure of damages is the gist of the remedy; the remedy is no part of the facts of the cause, while, on the other hand, it so completely controls the rights of the parties, that, if any absolute discretion be given to the jury over the amount of compensation, the power of the court over questions of law would be most emphatically a barren sceptre. The measure of damages in all cases, then, where no complaint is made of evil motive, is a pure question of law; in all cases of contract, the sole object of the

[11] It is therefore error in an action of contract to charge the jury that they may use their discretion in assessing damages. Jenkins *v.* Kirtley, 70 Kan. 801, 79 Pac. 671; Union Pac. Ry. *v.* Shook, 3 Kan. App. 710, 44 Pac. 685. Or that they may allow what they believe to be just and right.

Michigan: Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

Missouri: Kick *v.* Doerste, 45 Mo. 134.

court is to ascertain the agreement of the parties, and that agreement, as a general rule, controls the measure of remuneration. "In contracts," said the Supreme Court of Massachusetts,[12] "where the precise sum is fixed amd agreed on by the parties, as in many actions of assumpsit and of covenant, the jury are confined to that sum." **

* It is urged, says the Supreme Court of Pennsylvania, that the standard furnished by the contract "may be resorted to as *a* measure of damages, but not as *the* measure. If it be not the *exclusive* measure, it must be disregarded altogether. If it be but one of many standards, then there is no standard at all, or as good as none. The jury are without a rule when they have their choice between different rules." [13] "There are certain established rules," says the Court of Exchequer in England, "according to which the jury ought to find. And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." [14]

"It is desirable," says the Supreme Court of Massachusetts, "to have as definite and precise rules upon the subject of damages as are practicable." [15] "A proper administration of justice requires that the rules established by law for the assessment of damages should be adhered to," says the Supreme Court of Louisiana.[16] **

606a. Amount of the consideration not recoverable.

The amount of the consideration is not the measure of recovery.[17] * So, where the plaintiff had forborne a debt, in consideration that the defendant would build a house and give a lease of it, the value of the lease was the standard.[18] So, where a wagon was transferred in consideration that the de-

[12] Leland *v.* Stone, 10 Mass. 459.

[13] McDowell *v.* Oyer, 21 Pa. 417.

[14] Alder *v.* Keighley, 15 M. & W. 117.

[15] Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201.

[16] Arrowsmith *v.* Gordon, 3 La. Ann. 105.

[17] *Arkansas:* Manuel *v.* Campbell, 3 Ark. 324.

California: Norddeutschen F. V. G. *v.* Bertheau, 79 Cal. 495; Rayner *v.* Jones, 90 Cal. 78, 27 Pac. 24.

Michigan: Pierson *v.* Spaulding, 61 Mich. 90.

Tennessee: Singleton *v.* Wilson, 85 Tenn. 344.

Texas: Bell *v.* Keays (Tex. Civ. App.), 100 S. W. 813.

[18] Strutt *v.* Farlar, 16 M. & W. 249.

fendant would break up certain land, the value of the labor, and not of the wagon, was held to be the measure of damages.[19] So again, if the rent of mills is to be paid in repairs, the measure of damages is the value of the repairs agreed to be made.[20] ** On the same principle, where the plaintiff agreed to work for a man till she was 21 or married, and he agreed to leave her in his will a portion of his estate equal to that left to any of his children, it was held, in an action against his executors, that the measure of her damages was the value of the portion promised, and not the value of her services.[21]

In Homesly *v.* Elias [22] it appeared that the plaintiff sold yarn to the defendant to be paid for in cotton, the deliveries to be made before a certain day. Before that time the defendant refused to complete the contract. The plaintiff had then delivered more than enough yarn to pay for the cotton delivered. It was held that the plaintiff's damages were the value at the time of refusal of the cotton not delivered, less the value at the limit of time fixed for delivery of the yarn not delivered. Where one agreed with a surviving partner that he would pay the firm's debts, if the partner would apply the firm's property to his debts, it was held, in an action brought on this agreement by the surviving partner, that the measure of damages was the amount the other should have paid.[23] The measure of damages in an action by the father to recover the earnings of his minor son, is not what the son's labor would have been worth to the father, but what the son, had he been of age to contract, would have been entitled to from the employer.[24] So for breach of contract to teach a slave a trade, the measure of damages was held to be the additional value he would have had from knowing the trade.[25]

So where a town gave the defendant $1,000, for his agreement to run a factory employing twenty workmen in the town for ten years, and the defendant ran the factory for six years only the town could not, in an action for breach of the agree-

[19] Ellison *v.* Dove, 8 Blackf. (Ind.) 571.

[20] Baldwin *v.* Lessner, 8 Ga. 71.

[21] Frost *v.* Tarr, 53 Ind. 390.

[22] 75 N. C. 564.

[23] Weddle *v.* Stone, 12 Ind. 625.

[24] Weeks *v.* Holmes, 12 Cush. (Mass.) 215.

[25] Bell *v.* Walker, 5 Jones, L. (43 N. C.) 43.

ment, recover a proportional part of the $1,000,[26] and so for breach of a contract by which the defendant agreed to employ the plaintiff as its manager, in consideration of a conveyance of certain property to the defendant, the measure of damages is not the value of the property.[27]

This principle was lost sight of in a Missouri case.[28] The plaintiff agreed to help cut the defendant's wheat, for which the defendant was to help cut the plaintiff's oats; the plaintiff performed his part of the contract, the defendant did not perform his part. The plaintiff sued on a *quantum meruit* for the value of his services, and also for damages for failure to help cut the oats. It was held that damages for failure to help cut the oats could not be recovered, but the value of the plaintiff's services was allowed as the measure of damages. This was an allowance of the consideration.[29]

§ 606b. Inadequacy of consideration.

* It is to be observed that mere inadequacy of consideration is no objection to a contract. Some consideration is requisite, but the sufficiency of the consideration cannot be inquired into. So it has been contended that a guarantor of negotiable paper receiving a trifling percentage for his guaranty, could not be held liable for the whole face of the paper; but on the same ground he was held liable; [30] and the rule has been repeatedly declared, that the value of the services or the amount of the consideration is of no importance, where a stipulated sum is agreed to be paid for the performance of a specific service.[31] It is only where fraud, mistake, illegality, or oppression intervenes, that the consideration can, in this respect, be inquired into.**

§ 606c. Unconscionable agreements.

* There is a class of decisions which may at first sight appear

[26] Brighton *v.* Auston, 19 Ont. App. 305. *Contra*, Fort Wayne E. L. Co. *v.* Miller, 131 Ind. 499, 30 N. E. 23.

[27] Marston *v.* Singapore Rattan Co., 163 Mass. 296, 39 N. E. 1113.

[28] Otis *v.* Koontz, 70 Mo. 183.

[29] The claim to recover the consideration paid is ordinarily put on the ground that the plaintiff has the right to rescind the contract. It is sometimes recovered where the profits are uncertain. Missouri, K. & T. Ry. *v.* Fort Scott, 15 Kan. 435.

[30] Oakley *v.* Boorman, 21 Wend. (N. Y.) 588.

[31] Hamilton College *v.* Stewart, 1 N. Y. 581.

to be opposed to the general rule, that the contract furnishes the measure of damages. In an early case, brought on an assumpsit to pay for a horse a barley-corn a nail, doubling it every nail, with an averment that there were thirty-two nails in the shoes of the horse, which, being so doubled every nail, came to five hundred quarters of barley, the judge who tried the cause directed the jury to disregard the contract, and to give the value of the horse in damages, which was £8, and so they did.[32] The principle of this decision is, that if the agreement be unconscionable, the court will render such damages as may appear reasonable, without being bound by the terms of the contract. So in Massachusetts, where a note had been given to stay execution, payable in oats at twenty cents per bushel, when in fact they were worth thirty-seven cents, it was held that the jury might disregard the contract on the ground that it was unconscionable, and fix the value of the oats at twenty cents.[33] So in an action brought on a promise of £1,000

[32] James *v.* Morgan, 1 Levintz, 111. In another case, a somewhat similar contract came up on demurrer. The plaintiff declared on an agreement that the defendant, in consideration of 2*s.* 6*d.* in hand paid, and of £4 17*s.* 6*d.* to be paid on performance, agreed to deliver two grains of rye corn on Monday, the 29th of March, and four grains on the next Monday, and so doubling *quolibet alio die Lunæ* for one year. The defendant demurred, saying, "that the agreement appeared, upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity as all the rye in the world was not so much; and being impossible, was void, and the defendant not bound to perform it." But after argument the court thought otherwise, Powell, J., saying: "That though the contract was a foolish one, it would hold in law, and the defendant ought to pay something for his folly;" whereupon the reporter adds: "The counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his costs, which was accepted of, and so no judgment given in the case."

A question arose on the meaning of the contract—the defendant insisting that *quolibet alio die Lunæ* meant *every* Monday, but Lord Holt said it must be construed "*every other Monday.*" This made a material difference in the possibility of executing the contract; for if the quantity were doubled thirty times, it would have reached 125 quarters; if fifty-two, it would have amounted to 524,288,000 quarters. Thornborow *v.* Whitacre, 2 Lord Raym. 1164.

And the principle of James *v.* Morgan was approved of by Lord Chancellor Hardwicke, in Earl of Chesterfield *v.* Jansen, 1 Wils. 286, 295.

[33] Cutler *v.* How, 8 Mass. 257; Cutler *v.* Johnson, 8 Mass. 266; Baxter *v.* Wales, 12 Mass. 365; Leland *v.* Stone, 10 Mass. 459. And Lord Mansfield used analogous language in regard to the action for money had and received. "Shall a man," said his lordship, "in an action for money had and received, which is an equitable action, and

if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, that the jury might mitigate the damages.[34] ** And where the building of a jail was let to the lowest bidder, and the defendant took the contract at less than a fourth part of a fair price, and, upon his subsequent failure to perform, the contract was let to another contractor, it was held that the measure of damages was not the difference between the two bids, but the difference between a fair price at the first and at the second letting; the court remarking that "equity" will permit no more recovery than the actual loss caused by the defendant's foolish bidding.[35]

On this principle must be rested the decision in a New York case.[36] The defendants being engaged in a flour commission business, hired of the plaintiff for one night a canvas cover, fifty feet in length by twenty-five feet wide, to be spread over flour on board a canal boat lying at a wharf in the city of New York. The price to paid be for the use of the canvas was the "customary charge," which for twenty-four hours or less was proved to be one dollar. Through some oversight the cover was not returned until the lapse of about five weeks. The action was brought for the use of the canvas during the whole period last mentioned. The plaintiff insisted upon a recovery of one dollar for each day of the detention. It was held that defendants were not liable to be charged at the contract rate per day for every day during which the canvas was detained. The recovery should have been limited to the value of the use for the entire period of the detention. It will be noticed that this is the result of a fair interpretation of the contract; for the "customary charge" for one night was not the customary charge for five weeks.

But in a later case in Massachusetts, the earlier cases cited above are overruled, and the right of a court of law to modify an unconscionable contract has been denied.[37] The assertion of the right to sever the contract, to declare a part of it uncon-

founded in conscience, recover such an unmeasurable and exorbitant demand? Most clearly he shall not." Jestons *v.* Brooke, 2 Cowp. 793; and Floyer *v.* Edwards, 1 Cowp. 112.

[34] Bacon Abr. Damages, D.

[35] Chambers *v.* Fort Bend County, 14 Tex. 34.

[36] Russell *v.* Roberts, 3 E. D. Smith, 318.

[37] Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350.

scionable and oppressive, and to decree performance of the remainder, is the exercise of an equitable power of a high order, the incautious exercise of which might lead to very dangerous results. These cases might more properly be brought within the rule governing cases of fraud and oppression. If the contract is on its face so extortionate and unjust as to bear evident marks of deceit, then, instead of wasting time in trying to reduce the relief to the standard of strict justice, the whole agreement should be pronounced void. Under the modern system of pleading and the fusion of the two systems of Law and Equity, either party is usually able, in cases of unconscionable agreements, to obtain such equitable relief as he may be entitled to, either in the way of reforming or avoiding the contract.

§ 607. Preparations to perform.

As we shall presently see, the general rule is that the plaintiff recovers the sum total of the benefits or gains of a contract *less* the expenses. Hence he cannot recover for the expenses of preparations to commence performance of the contract, for he would have equally incurred those expenses if the defendant had performed his part.[38] Where, however, the plaintiff cannot recover the profits he would have made by his contract, as, when they are uncertain, he is in the ordinary case allowed to recover the expenses incurred by him in his preparations to perform.[39] So where the plaintiff agreed to supply laborers

[38] *Alabama:* Benziger *v.* Miller, 50 Ala. 206; Mason *v.* Ala. Iron Co., 73 Ala. 270.

Georgia: Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015.

Indiana: Williams *v.* Oliphant, 3 Ind. 271.

Massachusetts: Noble *v.* Ames Mfg. Co., 112 Mass. 402.

Utah: Hawley *v.* Corey, 9 Utah, 175, 33 Pac. 695.

Vermont: Curtis *v.* Smith, 48 Vt. 116.

West Virginia: Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

[39] *United States:* Ellithorpe Air-Brake Co. *v.* Sire, 41 Fed. 662 (to install elevator; no profits being proved, plaintiff recovers outlay on parts of elevator prepared for installing); Griffen *v.* Sprague Electric Co., 115 Fed. 749 (contract by defendant to test patent and use it if successful; plaintiff recovers expense of preparing for test); Curran *v.* Smith, 149 Fed. 945, 81 C. C. A. 537 (contract to investigate project for pipe line; expenditures made after contract signed in preparation for performance recoverable).

Alabama: Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382 (contract to mine and deliver iron ore;

for the defendant at $1.25 per day, and expended money in procuring laborers, but the defendant refused to hire them, no

if profits uncertain, reasonable expenses of preparation recoverable).

California: Cederberg *v.* Robison, 100 Cal. 93, 34 Pa. 625 (to harvest grain; plaintiff recovers outlay on faith of the contract).

Florida: Brent *v.* Parker, 23 Fla. 200, 1 So. 780 (to cut and haul timber; expense of making causeways and landings recoverable).

Georgia: McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34 (to submit a claim to arbitration; necessary expenses in preparing for arbitration may be recovered).

Illinois: Southern Pac. Co. *v.* American Well Works, 172 Ill. 9, 49 N. E. 575 (to sink wells; plaintiff gets value of materials for work which were prepared and wasted).

Iowa: Dean *v.* White, 5 Ia. 266 (to give use of defendant's mill; plaintiff recovers expense of preparing engine and boiler for use of mill).

Kansas: Arkansas V. T. & L. Co. *v.* Lincoln, 56 Kan. 145, 42 Pac. 706 (to build railroad through town; purchaser of land from the defendant recovers loss of profits of established business which he relinquished to move to the town); Paola Gas Co. *v.* Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598 (to supply fuel for factory; plaintiff recovers expense of attempt to operate factory).

Kentucky: Courier Journal Co. *v.* Millen, 20 Ky. L. Rep. 1811, 50 S. W. 46 (to employ plaintiff as agent in certain county; plaintiff recovers expense of hiring room, etc., in preparation).

Massachusetts: Johnson *v.* Arnold, 2 Cush. 46 (to employ plaintiff to take charge of a business; plaintiff recovers loss of time and expense of removal).

Mississippi: New Orleans, J. & G. N. R. R. *v.* Echols, 54 Miss. 264 (to buy water from plaintiff at certain station; plaintiff recovers expense of erecting water-tank there).

New York: People *v.* Flynn, 189 N. Y. 180, 82 N. E. 169 (holder of theatre ticket refused admission; recovers necessary expenses incurred to attend performance); Meylert *v.* Gas Consumers' Ben. Co., 14 N. Y. Supp. 148 (contract that plaintiff should introduce a patent burner; plaintiff recovers expense of preparation, and also amount he would have earned in his profession as physician); Abbey *v.* Mace, 19 N. Y. Supp. 375 (contract for decorating; plaintiff recovers expense of preparing machinery and value of time lost); Nelson *v.* Hatch, 70 App. Div. 206, 75 N. Y. Supp. 389 (contract by defendant to carry on litigation; advances and expenditures recoverable); Luxenberg *v.* Keith & P. A. Co., 64 Misc. 69, 117 N. Y. Supp. 979 (holder of theatre ticket refused admission; recovers necessary expenses incurred to attend performance).

North Carolina: Jones *v.* Mial, 89 N. C. 89 (to provide money for plaintiff to carry on business; plaintiff recovers time lost and expense of hiring assistance).

Pennsylvania: Rogers *v.* Davidson, 142 Pa. 436, 21 Atl. 1083 (to saw defendant's timber; plaintiff recovers cost of preparation to run the saw-mill).

South Carolina: Martin *v.* Seaboard A. L. Ry., 70 S. C. 8, 48 S. E. 616 (to run spur-track to plaintiff's mill; plaintiff recovers expenditures in expectation of having track).

Tennessee: Taylor *v.* Hunnicut, 42 S. W. 225 (to enter into partnership; plaintiff recovers value of time put into the business, also of time during which he remained idle in expectation of the partnership being formed).

Texas: Smith *v.* Crosby, 47 Tex. 121

damages being provable for loss of profits of the contract, the plaintiff was allowed to recover the expense of procuring the laborers.[40] So in an action for breach of contract to submit the claims of the parties to arbitrators, although it was found that the plaintiff had no claim, and, therefore, that the right was probably of very small value, he was allowed to recover "expenses to which he has been subjected by reason of his necessary preparations for a trial before the arbitrators, on account of his own loss of time and trouble, and in employing counsel, taking depositions, payments to witnesses and arbitrators," and other expenses, his recovery, however, being limited to these expenses only so far as these preparations would not be available for the trial of his cause before the ordinary tribunals.[41] So where it was found impossible to estimate the profits of a contract to build a railroad, the plaintiff was allowed to recover for the abrupt termination, for loss of material, for shanties put up, travel of hands, depreciation in value of tools, materials, etc.[42] And where the defendant agreed to set up a machine for the plaintiff, and give him the exclusive use of such machines in his county, the plaintiff, upon breach of the contract, may recover the loss incurred by procuring a boiler.[43] And upon breach of an agreement that the plaintiff shall have the exclusive sale of the defendant's goods in a certain territory, the plaintiff may recover the advertising expenses and other expenditures in preparation for sale.[44] So

(to locate land for defendant; plaintiff recovers value of time and labor in locating); Withers *v.* Edwards, 26 Tex. Civ. App. 189, 62 S. W. 795 (to cooperate in buying stock to secure control of a bank; plaintiff recovers premiums paid for stock above its actual value); Peacock *v.* Coltrane (Tex. Civ. App.), 116 S. W. 389 (to teach school; plaintiff recovers expense of hiring assistant).

England: Herring *v.* Tomlin, 28 Eng. L. & Eq. 142 (to enter into partnership; profits being uncertain, plaintiff recovers expense of journeys on the business of the firm).

Canada: Mandia *v.* McMahon, 17 Ont. App. 34 (to bring laborers from a distant place to work for defendant; plaintiff recovers expense of journey and of bringing the men).

[40] Mandia *v.* McMahon, 17 Ont. App. 34.

[41] *Georgia:* McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34.

Maine: Call *v.* Hagar, 69 Me. 521.

Massachusetts: Pond *v.* Harris, 113 Mass. 114; New Haven & N. Co. *v.* Hayden, 117 Mass. 433.

[42] Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

[43] Dean *v.* White, 5 Ia. 266.

[44] *United States:* Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440.

where the defendant agrees to provide plaintiff with a place for a public performance; since the profits of the business are too speculative for recovery, the plaintiff may recover the expenses of preparation for the performance.[45]

The case of Curtis *v.* Smith [46] may seem to be opposed to these views. In that case the plaintiff, a builder, had agreed to furnish stone and to build some wing walls for the defendant's bakery, to be commenced when the stagings were taken down. Before they were taken down, the defendant terminated the contract. The plaintiff had performed some labor in getting out stone. The court said, that if the intention was that the quarrying should not be commenced till after the staging had been taken down, then the plaintiff could only recover the excess of the contract price over what it would have cost him to perform, but that if the stone was to be quarried previous to the taking down of the staging, the plaintiff should recover the difference between the value of the stone and the value of the plaintiff's services in getting it out. In this case it appears that the decision turned upon the interpretation of the contract; and no allowance was made for mere *preparations* to perform, because the profits of the contract were given as damages. And in the case of Curran *v.* Smith [47] the legal expenses of preparing the contract for signature were not allowed, on the ground that they were quite independent of performance or of preparation to perform.

In another class of cases, where the expenses incurred by the plaintiff had no relation to the defendant's performance, it has been said they could not be recovered, though the profits of the contract were too uncertain for recovery. So where plaintiff undertook to put down at an agreed price per foot a well

Ohio: Smith *v.* Weed S. M. Co., 26 Oh. St. 562.

West Virginia: Sterling O. Co. *v.* House, 25 W. Va. 64.

See, however, Carroll-Porter B. & T. Co. *v.* Columbus Mach. Co., 55 Fed. 451, 5 C. C. A. 190.

[45] *Arkansas:* O'Connell *v.* Rosso, 56 Ark. 603, 29 S. W. 531 (providing apparatus, procuring license, getting performers to the place).

Missouri: Athletic Baseball Assoc. *v.* St. Louis S. P. Assoc., 67 Mo. App. 653 (traveling expenses); Claudius *v.* West End H. A. Co., 109 Mo. App. 346, 84 S. W. 354.

New York: Bernstein *v.* Meech, 130 N. Y. 354, 29 N. E. 255.

[46] 48 Vt. 116.

[47] 149 Fed. 945, 81 C. C. A. 537.

which could not be pumped dry, and after several unsuccessful borings he was stopped in the midst of another boring, it was held that he could not recover the cost of the abandoned borings. The labor, as the court said, had been expended in vain, and no part of the cost could have been recovered if they had completed the contract.[48] So where three persons covenanted jointly to buy a set of boring tolls and each sink an oil well on his own land, and at his own expense, and if successful to deliver to the others one-twentieth of the oil taken, and one sunk his well but obtained no oil, and there was no evidence that any could be obtained, the court held that he could not recover in an action against one of the others the expense of sinking his own well.[49]

It is submitted that the real reason for the distinction in these cases is the speculative nature of the contract. If the whole matter is a speculation there can be no presumption that the plaintiff would have realized from performance an amount equal to the cost of preparation; in these cases it is quite clear that he would not have done so.

If there is an express contract to pay any expenses incurred, of course the defendant is liable to the plaintiff for the amount.[50] So where a lessor had agreed to pay the lessee for any damage sustained in consequence of fitting up the premises if he ousted him, the lessee was allowed to recover the expense of fitting them up, *less* the use which he had had for two years. In the estimate should be included, it was said, the injury to the carpets by being cut.[51] So, also, where there is an implied contract, for instance, where the United States had agreed to pay the defendant for services, and to give him due notice beforehand of the time when performance would be required. Notice was given, but performance was not required. The plaintiff was not allowed to recover the profits he would have made, but was allowed to recover for injury suffered by making ready to meet the requirements of the contract, which would include damages for "loss of time," "trouble and expense." The no-

[48] Reynolds *v.* Levi, 122 Mich. 115, 80 N. W. 999.

[49] Hutchinson *v.* Snider, 137 Pa. 1, 20 Atl. 510.

[50] Tufts *v.* Plymouth G. M. Co., 14 All. (Mass.) 407.

[51] Pratt *v.* Paine, 119 Mass. 439.

tice seems to have been treated as an implied promise to pay for expenses incurred if performance was not required.[52]

§ 607a. Expense of removal.

Expense of removal to leased premises, of which the landlord fails to give possession, may be recovered. Thus where an agreement had been made to let certain premises as a tavern stand, and the plaintiff had removed his family to take possession, which was refused, it was held that the plaintiff was entitled to recover, not only the value of the lease, but also his expenses in removing his family and furniture, and this without any allegation of special damage in the declaration.[53]

Where the agreement is that the plaintiff shall come from a distance and take employment with the defendant, in an action for breach of the contract of employment, the plaintiff may recover the expense of removal. Thus where a defendant had engaged the plaintiff to remove to Indiana, to carry on business there, and failed to furnish the stock necessary for so doing, the court allowed the plaintiff as damages compensation for the loss of his time in removing to Indiana and back again to his original domicile.[54]

So, in New Hampshire, where the defendant proposed by letter to the plaintiff that the latter should come to that State from Minnesota; agreeing, if he would do so, to give him and his wife a year's board, and allow him to carry on the defendant's farm; it was held that the expenses incurred by the plaintiff in removing his family, and probably compensation for his necessary loss of time, might be recovered.[55] So where the defendant agreed to support plaintiff if plaintiff would live with him, plaintiff may recover the expenses of removal.[56]

A Massachusetts decision seems difficult to reconcile with

[52] Bulkley *v.* U. S., 19 Wall. 37, 22 L. ed. 62.

[53] Driggs *v.* Dwight, 17 Wend. (N. Y.) 71; Lawrence *v.* Wardwell, 6 Barb. (N. Y.) 423, *acc.*, Giles *v.* O'Toole, 4 Barb. (N. Y.) 261.

But he may not recover the expense of packing and storing his goods a long time in advance. Lowenstein *v.* Chappell, 30 Barb. (N. Y.) 241.

[54] Johnson *v.* Arnold, 2 Cush. (Mass.) 46; *acc.*, McLean *v.* News Pub. Co., (N. D.) 129 N. W. 93.

[55] Woodbury *v.* Jones, 44 N. H. 206.

[56] *Kentucky:* McDaniel *v.* Hutcherson, 136 Ky. 412, 124 S. W. 384.

Nebraska: Bryant *v.* Barton, 32 Neb. 613, 49 N. W. 331.

New Hampshire: Woodbury *v.* Jones, 44 N. H. 206.

this general doctrine.[57] In that case the offer was: "I am ready to offer you a foreman's situation as soon as you may get here." It was held that the plaintiff could not recover the expenses of his journey from the Sandwich Islands to Massachusetts, nor the value of his time in the journey. Morton, J., said: "The expenses of the removal were incurred before the contract took effect." Though this may be technically true, the removal was contemplated by the parties as a consequence of the offer, and it is difficult to distinguish the case from others in which the expense of removal was allowed. In a later case in the same State [58] in which it appeared that the plaintiff, on the promise of the defendant to give property to plaintiff's wife, after defendant's death, if plaintiff would move "from his residence" to defendant's home, and take care of her, accepted the offer, and actually removed his buildings to defendant's land, he was not allowed to recover the cost of moving the buildings, since this was not called for by the contract.

§ 607b. Stock of goods purchased on faith of lease or conveyance.

Loss on a stock of goods bought on faith of a lease of business premises of which the lessor refuses to give possession is, it would seem, too remote. Nevertheless, in an early case, in which the plaintiff declared for breach of an agreement to let the plaintiff have the use of certain mills for six months, in consideration of £10, it appeared that the mills were worth but £20 per annum, and yet damages were given to £500, by reason of the stock laid in by the plaintiff; and, *per curiam*, "the jury may well find such damages, for they are not only bound to give the £10, but also all the special damages." [59] The Supreme Court of New York, commenting on this case, said: "Very likely it appeared that the breach of contract was committed to favor some particular interest of the defendant, or his friend, though the case mentions a simple refusal to perform;" [60] but perhaps it may rather be brought within the rule of Hadley *v.* Baxendale, which will be presently stated, both parties know-

[57] Noble *v.* Ames Manufacturing Co., 112 Mass. 492.

[58] Kenerson *v.* Colgan, 164 Mass. 166, 41 N. E. 122.

[59] Nurse *v.* Barns, T. Raym. 77.

[60] Blanchard *v.* Ely, 21 Wend. 342.

ing the object to which the mills were to be applied, and the loss of the plaintiff's stock being considered as contemplated by them.

Recent authorities hold such a loss not to be compensated, in the absence of notice. Thus, where the leased premises consisted of a farm, the plaintiff was not allowed to recover the loss he suffered by a purchase of stock for it.[61]

In a similar action, where machinery of a less capacity than that bargained for was furnished for a new mill, it was held that loss on large purchases of stock for running a mill of the agreed capacity and loss caused by abandoning the planting for the milling business, were both too remote.[62] Where the defendant broke his contract to convey land to the plaintiff, the latter cannot recover compensation for money paid an architect for plans for a proposed building on the premises.[63] But he may recover for expense of examining title.[64]

§ 608. Reduction of damages: Rule of avoidable consequences.

The rule of avoidable consequences is fully applicable to actions for breach of contract. So for breach of a contract to repair, the plaintiff cannot recover consequential damages resulting to his property from a failure to repair, except for such damage as happened before he could reasonably make the repairs himself,[65] and for failure properly to construct waterworks the plaintiff could not recover for damage caused by leaking after he should have repaired the leaks himself;[66] so on breach of an agreement that plaintiff might store secondhand brick on a lot adjoining that upon which he was building a house, the plaintiff could not recover the value of the brick but only the cost of removing them and storing them elsewhere.[67] On this principle it was held that for a breach of the contract to remove the plaintiff's hotel the plaintiff could not

[61] Robrecht *v.* Marling, 29 W. Va. 765.

[62] Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435.

[63] Chamberlain *v.* Brady, 49 N. Y. Super. Ct. 484.

[64] Walker *v.* Moore, 10 B. & C. 416.

[65] *Louisiana:* Cable *v.* Leeds, 6 La. Ann. 293.

Tennessee: Fort *v.* Orndoff, 7 Heisk. 167.

[66] Hensen *v.* Beebe, 111 Iowa, 534, 82 N. W. 942.

[67] Zinn *v.* N. J. Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402.

recover the profits which he could have made from the hotel, but only the expense of procuring its removal by another.[68] For a defect in part of a machine the plaintiff could not recover for loss of use of the machine if the part could have been replaced.[69] Where the defendant contracted to take and pasture cattle and the contract was terminable at any time at the will of the plaintiff and the plaintiff claimed damages for injury to the cattle by reason of poor pasturage it was held that if he discovered that the animals were not being properly pastured and nevertheless allowed them to remain in the defendant's possession, he could not recover damages for injury to the cattle by the poor pasturage.[70]

On this principle again where the defendant had agreed to furnish power, and the power was to the knowledge of the plaintiff insufficient, the latter cannot recover the value of raw materials spoiled in an unwise attempt to manufacture.[71] On the other hand, where logs were badly sawed by the defendant in the performance of a contract, but the damages could have been reduced by resawing this should be done.[72]

Attempts have been made to reduce the measure of recovery by showing that the plaintiff made or might have made another contract, to be performed at the same time in which the contract in suit was to have been performed. Thus where the plaintiff sued on a contract for driving piles, the court intimated that the defendant might reduce the damages by showing that the plaintiff could have gotten other contracts, immediately upon the defendant's breach, and might have made a profit from them.[73]

But the better opinion is, as we have already seen,[74] that no such reduction should be allowed.[75] In the first place, it sel-

[68] Sherman Center Town Co. *v.* Leonard, 46 Kan. 354, 26 Pac. 717.

[69] D. N. Osborne & Co. *v.* Carpenter, 37 Minn. 331, 34 N. W. 163.

[70] Loomer *v.* Thomas, 38 Neb. 277, 56 N. W. 973. The same principle applies in case of a contract to supply feed for cattle. Kentucky D. & W. Co. *v.* Lillard, 160 Fed. 34, 87 C. C. A. 191.

[71] Russell *v.* Giblin, 16 Daly, 258, 10 N. Y. Supp. 315.

[72] Grice *v.* Noble, 66 Mich. 700, 33 N. W. 768.

[73] Cincinnati, I. St. L. & C. Ry. *v.* Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

[74] See chapter on Avoidable Consequences.

[75] *Iowa:* Klingman *v.* Racine Sattley Co. (Ia.), 128 N. W. 1109 (to sell defendant's goods).

Missouri: Black River L. Co. *v.*

dom appears that both contracts might not have been entered into and a profit made upon both by the plaintiff. In the second place, the defendant has no claim, legal or equitable, to have the benefit of the second contract. The seeming analogy of contracts of service is not sound, for in such contracts the measure of damages is the loss of the wages of service, and if another employment can be obtained the defendant does not cause a loss of wages. To state it in another way, the profits of a contract of service consist in the difference between the wages that can be earned under the contract and the wages that can be earned elsewhere, and there is no possibility of the plaintiff's obtaining double employment at the same time. In an ordinary contract the profits are measured by the difference between the price to be obtained for the plaintiff's performance under the contract and the cost at which the plaintiff can perform. Accordingly where the plaintiff agreed to barb the defendant's wire at a certain price the defendant cannot reduce the damages by showing that the plaintiff might have procured other contracts for barbing wire.[76] So when the plaintiff contracted to clear the defendant's field of stumps for a certain sum in gross, it was held that the defendant could not reduce the damages by showing the amount the plaintiff earned elsewhere;[77] and where the defendant refused the plaintiff possession of a farm he had agreed to lease, damages could not be reduced by showing that the plaintiff had engaged in hauling at a profit.[78]

In some cases, however, it has been shown that the plaintiff after breach of contract by the defendant made profits which could properly be regarded as a substitute for the profits the plaintiff would have received by the performance of the defendant's contract and which, therefore, the plaintiff could not have

Warner, 93 Mo. 374, 6 S. W. 210, 3 Am. St. Rep. 544 (to saw lumber).

New York: Durkee *v.* Mott, 8 Barb. 423 (to raft lumber).

Texas: Western U. T. Co. *v.* Williams (Tex. Civ. App.), 137 S. W. 148.

Washington: Watson *v.* Gray's H. B. Co., 3 Wash. 283, 28 Pac. 527 (to sink a well).

Wisconsin: Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1 (to pull stumps); Cameron *v.* White, 74 Wis. 425, 43 N. W. 408, 5 L. R. A. 493 (to saw lumber); Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979 (to cut and deliver logs).

[76] Crescent Mfg. Co. *v.* Nelson Mfg. Co., 100 Mo. 325, 13 S. W. 503.

[77] Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1.

[78] Wolf *v.* Studebaker, 65 Pa. 459.

made if the defendant's breach of contract had not put him in a position to do so. In a case of this sort, if such profits can be made after breach of contract by the defendant the rule of avoidable consequences would require the plaintiff to make them and thus relieve the defendant from a portion of the loss caused by his breach. Such case arises where the defendant had chartered space in the plaintiff's vessel and then failed to provide a cargo. If the space thus left unfilled could have been filled by the plaintiff the amount of freight he could thus have realized should be deducted from the damages to be paid by the defendant.[79] So where the defendant broke his contract to supply a certain amount of advertising to the plaintiff, but the plaintiff filled all the space reserved for the defendant with equally profitable advertising matter, it was held that this fact could be shown in reduction of damages.[80] And where upon breach of a contract by plaintiff to manufacture a number of automobile parts for defendant at a certain price, the plaintiff obtained another contract with another company to manufacture automobile parts, which occupied the plaintiff's entire time and force employed, and the profits of the second contract offset the entire loss of the first, it was held that this could be shown to diminish damages.[81] It will be noticed that in such cases the subtraction of this amount is necessary in order to arrive at the real profit of the contract, since the sacrifice of the substituted profit would be necessary in order to earn the payment due under the contract and therefore as an expense of performance it must be subtracted from the contract price in order to arrive at the profit.

On this principle, on breach of a contract which calls for the use of plaintiff's property or the expenditure of a certain amount of plaintiff's time the use of the property or the time may be saved to the plaintiff, and for the value of the property or time thus saved an allowance must be made. Such value may be most easily proved by showing what the plaintiff realized, or

[79] Medberry *v.* Sweet, 3 Chand. (Wis.) 231, 3 Pinn. 210.

[80] Savage *v.* Medical and Surgical Association, 59 Mich. 400. The court said that no action would lie; but the plaintiff was clearly entitled, at the least, to nominal damages.

[81] Harrington-Wiard Co. *v.* Blomstrom Mfg. Co. (Mich.), 131 N. W. 559.

might have realized, by the use of the property or time.[82] And on the same principle it has been held that where the plaintiff agreed to manufacture steel rails for the defendant at a certain price, and the defendant refused to receive them, the trial court allowed profits made from the sale to another party of rails made from the steel procured to fill the defendant's order, to be subtracted from the profits of the contract with the defendant; and the judgment was affirmed in the Supreme Court of the United States; the court saying that the defendant thereby received the benefit of all profits made by the plaintiff which could properly be regarded as a substitute for the profits it would have received had the contract been carried out.[83]

Where the plaintiff contracted to saw in his saw-mill the defendant's logs, and the logs were not supplied, it has been held that the profits made by using the mill to saw other logs should be deducted.[84] The correctness of this decision may be questioned. The value of the steel and of the use of the saw-mill should of course be deducted in order to arrive at the profits of the contract broken; but the defendant should not be entitled to the profits of the other contract.

In such cases if the substituted profits can be deducted the

[82] Plaintiff's time required for performance: deduct income from time saved.

Nebraska: Jewett *v.* Wilmot, 57 Neb. 700, 71 N. W. 775.

Texas: Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

Plaintiff's property to be used in performance; deduct income from use of that specific property which was made possible only by the breach. Dunn *v.* Allen, 59 App. Div. 561, 67 N. Y. Supp. 218; Baker Transfer Co. *v.* Merchants' R. & I. M. Co., 12 App. Div. 260, 42 N. Y. Supp. 76.

It should be noticed in these cases that the rule in certain contingencies is one which does not cut down but one which enlarges recovery. The profit of the contract would be arrived at by subtracting from the contract price the cost of performance, and the value of the property or time would be subtracted as part of the cost of performance. If, however, there were no other demand for the use of the property or the time, a loss of this profitable employment of them would be a consequence of the breach. The true doctrine would therefore seem to be that the value of the use of property or time should in these cases be deducted, unless it can be shown by the plaintiff that by the breach they were left on his hands without any chance of employing them usefully.

[83] Hinckley *v.* Pittsburgh B. S. Co., 121 U. S. 264, 276, 30 L. ed. 967, 7 Sup. Ct. 875; *acc.*, Diamond State I. Co. *v.* San Antonio & A. P. Ry., 11 Tex. Civ. App. 587, 33 S. W. 987.

[84] *Kentucky:* Frazier *v.* Clark, 88 Ky. 260, 10 S. W. 806.

Michigan: Petrie *v.* Lane, 67 Mich. 454, 35 N. W. 70.

burden is on the defendant of establishing the fact that they were or should have been earned.[85]

§ 609. General principles of recovery.

A contract is conceived as a valuable right owned by the parties of it and a breach of the contract is regarded as depriving the owner of his contract right. The damage caused by the breach is therefore the damage caused by the destruction of a right of property and is measured by the value of the property. The measure of damages for breach of contract then is the value of the contract right destroyed by the breach. In the case of many contracts there is no market value, since contracts generally are not bought and sold in the market. There are, to be sure, many contracts which are so bought and sold; among these are contracts for the future delivery of articles dealt with in the market. Of such contracts we shall speak later. A contract, as such, however, has no market value and damages for its breach must therefore be measured by its actual value. This value is most readily found by showing what would be the benefit of having the contract performed, that is, what would have been received upon performance of the contract, over and above what must be given to secure performance. If the performance of a contract would be profitable to the plaintiff, that is, if upon its performance by the defendant the plaintiff would have left in his hands more than it would have cost him to perform on his side, then the contract itself, entirely apart from the effect of the performance upon his other property, would have a certain pecuniary value measured by the amount of such profit remaining in his hands. This is the direct profit of the contract. If by reason of non-performance on the part of the defendant the plaintiff loses his contract he is entitled on the general principles of recovery to its value and this value as has been seen is the direct profit. Such direct profit of a contract is therefore always recoverable in an action for the breach.

On the other hand, the value of the contract is not the value

[85] *Indiana:* Cincinnati & C. Ry. *v.* Lutes, 112 Ind. 276, 11 N. E. 784.
New York: Railway Advertising Co. *v.* Standard R. C. Co., 83 App. Div. 191, 83 N. Y. Supp. 338; affirmed, 178 N. Y. 570, 70 N. E. 1108.

of what the plaintiff was to receive from the performance of it, unless there is nothing to be done on his part to secure the benefit of it. He cannot, for instance, recover the contract price for work he was to do without first deducting the cost of the work not yet done.[86]

§ 610.[a] Nominal damages.

The right to the performance of a contract is an absolute right and any breach of the contract is a wrong to the other party, whether actual damage follows or not. As a consequence of this principle, the plaintiff may always recover for breach of a contract at least nominal damages even though he is unable by evidence to establish that any particular loss has been suffered.[87] But where there is no sufficiently certain proof of the amount of the damages, nominal damages only are recoverable;[88] the burden being on the plaintiff to prove the amount of damages.[89] So for breach of a contract by the purchaser of land to build houses on the land within a year only nominal damages can be recovered, the amount of the loss being too speculative to be proved.[90] And in Finney *v.* Cad-

[a] For § 610 of the 8th edition see § 606*a*.

[86] Brown *v.* Mader, 120 App. Div. 15, 105 N. Y. Supp. 705.

[87] *Louisiana:* Judice *v.* Southern Pac. Co., 47 La. Ann. 257, 16 So. 816; Bourdette *v.* Sieward, 107 La. 264, 31 So. 630; Green *v.* Farmers' Consol. Dairy Co., 113 La. 869, 37 So. 858.

Nebraska: Kreamer *v.* Irwin, 46 Neb. 827, 65 N. W. 885.

New Jersey: Rockwell *v.* American L. B. Co., 76 Atl. 334.

New York: Hopedale Electric Co. *v.* Electric S. B. Co., 96 App. Div. 344, 89 N. Y. Supp. 325; American S. S. Co. *v.* Rush, 100 N. Y. Supp. 1019.

North Carolina: Clinton *v.* Mercer, 3 Murph. 119.

[88] *United States:* Chesapeake T. Co. *v.* Walker, 158 Fed. 850.

Colorado: Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236, 46 Am. St. Rep. 288.

Georgia: Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240.

Maryland: Lanahan *v.* Heaver, 79 Md. 413, 29 Atl. 1036.

Michigan: Shaw-Walker Co. *v.* Fitzsimmons, 148 Mich. 626, 112 N. W. 501.

New York: Independent T. Y. M. B. Assoc. *v.* Somach, 52 Misc. 538, 102 N. Y. Supp. 495.

Texas: Drumm S. & F. Co. *v.* J. Horace McFarland Co. (Tex. Civ. App.), 30 S. W. 93; Albertype Co. *v.* Gust Feist Co., 114 S. W. 791.

Washington: Church *v.* Wilkeson-Tripp Co., 58 Wash. 262, 108 Pac. 596.

[89] *Alabama:* Taylor *v.* Howard, 110 Ala. 468, 18 So. 311.

New York: Benner *v.* Phœnix Towing & Transp. Co., 80 Hun, 412, 30 N. Y. Supp. 290.

Pennsylvania: Lentz *v.* Choteau, 42 Pa. 435.

[90] McConaghy *v.* Pemberton, 168 Pa. 121, 31 Atl. 996.

wallader [91] an agreement was made to establish a bank and make the defendant its manager, and to establish a line of steamers and make the defendant its agent. It was held that damages for a breach of this contract were too remote and uncertain to be estimated.

It is, however, to be noticed that in such a case every reasonable presumption is to be made against the wrongdoing defendant, and if by the aid of such presumption the damages can be fixed the plaintiff may recover substantial damages.[92]

Since the profits are found by subtracting the cost of doing the work from the contract price, it is clear that if the cost of doing the work is equal to or greater than the contract price, the damages are nominal.[93] The same is true if for lack of evidence it is impossible to prove what the profit of the contract would have been. So when it is impossible to estimate the profit of doing the work because the cost of performance cannot be proved, and no money has been expended, nominal damages only can be recovered; [94] as where the amount of work is left uncertain.[95] So if the performance by the defendant would have given something other than money to the plaintiff, nominal damages only can be recovered if the value of performance cannot be proved.[96]

§ 611.[a] Executed contracts.

If the contract on the plaintiff's side has been entirely performed before breach by the defendant, the plaintiff may recover the entire value of the defendant's performance; since he is entitled to the performance without further expense on his

[a] For § 611 of the 8th edition see § 606*b*.

[91] 55 Ga. 75.

[92] Wilson *v.* Northampton & B. J. Ry., L. R. 9 Ch. 279.

[93] *United States:* Harvey *v.* United States, 8 Ct. Cl. 501.

Connecticut: Beattie *v.* New York, N. H. & H. R. R., 80 Atl. 709.

Kentucky: O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251.

New York: Durkee *v.* Mott, 8 Barb. 423.

Ohio: Toledo *v.* Libbie, 19 Ohio C. Ct. 704.

[94] *Florida:* Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

New Jersey: Harrison *v.* Clarke, 78 N. J. L. 236, 73 Atl. 43.

[95] Wakeford *v.* Commissioner of Railways, 2 N. S. W. L. R. 258.

[96] *Illinois:* Tribune Co. *v.* Bradshaw, 20 Ill. App. 17.

Missouri: Gibson *v.* Whip Pub. Co., 28 Mo. App. 450.

Pennsylvania: Kenderdine H. C. F. Co. *v.* Plumb, 182 Pa. 463, 38 Atl. 480.

own part.[97] If the performance by the defendant consisted in the payment of a certain sum of money, this must be paid upon full execution of the plaintiff's side. Thus where an owner of logs agreed with the plaintiff to pay him a certain amount for hauling the logs, and a creditor of the owner attached the logs and agreed to pay the plaintiff upon their delivery, the plaintiff, having hauled the logs, may recover from the attaching creditor the agreed compensation, though the plaintiff had received a partial payment upon the original contract.[98] So where a father agreed to pay his son a fixed sum per week for board, and then left to the son certain property in lieu of payment, the son, renouncing the legacy, could not claim the value of the board, but only the contract price.[99] And where defendant, as part consideration for the purchase of a machine, agreed to test it with another machine and if it were better to pay an additional amount, and then refused to make the test, plaintiff, upon proving that his machine was better than the other machine, was allowed the additional amount agreed to be paid.[100] And so where a contract has been fully performed, the plaintiff cannot recover the value of performance on a *quantum meruit*, but is restricted to the contract price.[101]

Where the contract has been fully performed on the plaintiff's part, and by the terms of the contract the defendant was to give the plaintiff something else than money, or was to perform services for him, the plaintiff may recover the value of the

[97] Defendant in return for permission to cut wood on the plaintiff's lot, agrees to deliver an equal amount of wood to the plaintiff on demand; on breach of this agreement the plaintiff may recover the value of the wood at the time of demand. Mitchell *v.* Gile, 12 N. H. 390. In return for conveyance of plaintiff's land defendant agreed to give warrants for other land; on breach, plaintiff recovers value of the warrants. Rayner *v.* Jones, 90 Cal. 78, 27 Pac. 24. Defendant agrees to convey land in return for services to be rendered by the plaintiff; plaintiff having performed the services may recover the value of the land. McDowell *v.* Oyer, 21 Pa. 417.

[98] Miller *v.* Ward, 2 Conn. 494.

[99] Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

[100] Hopedale Electric Co. *v.* Electric S. B. Co., 132 App. Div. 348, 116 N. Y. Supp. 859; affirmed, 198 N. Y. 588, 92 N. E. 1086.

[101] *Indiana:* Kentucky & I. C. Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802.

New Jersey: Weart *v.* Hoagland, 22 N. J. L. 517.

Texas: Kocher *v.* Mayberry, 15 Tex. Civ. App. 342, 39 S. W. 604.

thing or the services.[102] So where the defendant guaranteed that the plaintiff should realize ten per cent profit on certain goods, but, in fact, the goods, though sold at the market price, were sold at a loss, the measure of damages was the difference between the cost of the goods, plus ten per cent, and the amount realized from the sale of them.[103] So where the plaintiff purchased a house of the defendant, who, as part consideration for the price paid, agreed to keep the house rented at a certain rental for a given period, but failed to do so, the plaintiff, on obtaining the best rental he could, was allowed to recover the deficit.[104] Plaintiff was to serve defendant in his business, and as soon as the profits amounted to $800 plaintiff was to be entitled to a half interest in the business. When the profits had reached $780, defendant wrongfully terminated the arrangement. It was held that the measure of damages was the value of the half interest in the business, making allowance for the amount which had not been earned.[105] Plaintiff contracted to furnish ballast to a railroad, which was to furnish the stone-crusher. They furnished a crusher which was insufficient. The measure of damages was the difference between the cost of manufacturing with the crusher furnished and what it would have cost with a proper crusher.[106] The plaintiff transferred his stock of goods to the defendant, on the agreement of the latter to pay certain debts of the plaintiff, and if he could sell the stock for more than the amount of the debts, to return the net balance to the plaintiff. The plaintiff afterwards secured an offer to give certain land for the stock of

[102] *Missouri:* Ramsey *v.* Maberry, 135 Mo. App. 569, 116 S. W. 1066 (to allow mortgagor to remove mortgaged cattle to another market for sale; on breach plaintiff recovers difference between market price in the other market and what they actually sold for); Kansas City *v.* Davidson, 154 Mo. App. 269, 133 S. W. 365 (in return for dirt taken from plaintiff's lot, defendant agreed to grade the lot; on breach plaintiff recovers cost of grading).

New York: May *v.* Poluhoff, 65 Misc. 546, 120 N. Y. Supp. 827 (defendant granted advertising privilege, and it proved he had no title to it; plaintiff recovers value of privilege).

[103] Morris *v.* Barrett, 24 Oh. St. 201; *acc.*, of a guaranty to sell the plaintiff's property at a certain price, Dunn *v.* Mackey, 80 Cal. 104.

[104] Williams *v.* Arnold, 139 Wis. 177, 120 N. W. 824. And so of a contract to sell plaintiff's land for a certain price. George *v.* Lane, 80 Kan. 94, 102 Pac. 55.

[105] Gilbert *v.* Grubel, 82 Kan. 476, 108 Pac. 798.

[106] El Paso & S. W. R. R. *v.* Eichel & Weikel (Tex. Civ. App.), 130 S. W. 922.

goods, which the defendant accepted. The defendant finally refused to carry out the transaction. In an action for breach of the original contract plaintiff may recover the amount of the debts which the defendant agreed to pay, together with the excess, if any, of the value of the land for which defendant had agreed to exchange the goods over the amount of the debts and the expenses.[107]

Upon this ground, if plaintiff performs services upon an agreement to receive in payment stock in a corporation, and he performs the services but does not receive the stock, the measure of damages is the actual value of the stock.[108]

§ 612.[a] Entire contract price recoverable in some cases.

In some cases the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from the school during the quarter the schoolmaster may recover the tuition fee for the whole quarter.[109] So upon an agreement to pay the plaintiff a certain amount for his legal services in a pending litigation he may recover the agreed amount, though the controversy is brought to an end by compromise.[110] Where it was agreed that the plaintiff should weigh all the grain carried over the defendant's road at a stipulated price, and the defendant allowed another to weigh grain, the plaintiff was allowed to recover at the contract price for all grain thus weighed by the other.[111]

The principle upon which these cases rest seems to be, that the whole contract price is to be given, because it is impossible

[a] For § 612 of the 8th edition see § 606c.

[107] Doolittle *v.* Murray, 134 Ia. 536, 111 N. W. 999.

[108] Ware *v.* McMurray, 74 N. J. L. 37, 64 Atl. 967.

[109] *England:* Collins *v.* Price, 5 Bing. 132.

Alabama: Sprague *v.* Morgan, 7 Ala. 952.

See, however, *Michigan:* International T. B. Co. *v.* Schulte, 151 Mich. 149, 114 N. W. 1031; International T. B. Co. *v.* Jones, 131 N. W. 98; International T. B. Co. *v.* Marvin, 132 N. W. 437.

[110] *Alabama:* Hunt *v.* Test, 8 Ala. 713, 42 Am. Dec. 659.

California: Baldwin *v.* Bennett, 4 Cal. 392.

[111] Lake Shore & M. S. Ry. *v.* Richards, 126 Ill. 448.

So where, in a contract for work on a building, the work is almost completed, so that it would be impracticable for the laborer to secure employment elsewhere during the short time required for completion, he may upon discharge recover the entire contract price for the labor. Danley *v.* Williams, 16 Wis. 581.

to show with the required certainty any pecuniary outlay which the plaintiff has been saved by the breach. The school must continue in session, with its entire corps of instructors, although a scholar is withdrawn; the office of a weigher of grain must still be kept open, and at the same expense, though part of the anticipated custom fails. So far as the evidence shows, it would have cost the plaintiff nothing, in addition to the expense he had already been put to, if he had fully performed on his side. If, in such a case, the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages.[112]

So where plaintiff agreed to guaranty defendant against loss in a certain business for a year for a percentage of the total sales, and defendant sold the business during the year, plaintiff at the end of the year could recover the agreed percentage on the sales made by the purchaser of the business.[113] So where the plaintiff engages transportation for his goods, and at the time for delivering the goods he fails to provide them, the carrier, if he is unable to obtain other goods to carry, may recover the agreed freight.[114] And where a lodger engages a room for a certain term and fails to occupy the room, the landlord, if unable to let the room to another, may recover the agreed rent.[115] And in case of breach of an agreement to take advertising space, the plaintiff, in the absence of evidence to show less damage, recovers the contract price.[116] In such cases the burden is on the defendant to show that the damage is less than the agreed compensation.[117]

§ 612a. Readiness to perform or tender of performance.

In the ordinary case the plaintiff cannot by showing readiness to perform or a tender of performance, recover the contract price.[118] So on a contract to transport horses in a canal-

[112] Wood *v.* Schettler, 23 Wis. 501.

[113] Wilson *v.* Wernwag, 217 Pa. 82, 66 Atl. 242.

[114] Burrow *v.* Pound, 29 Mo. 435, 77 Am. Dec. 579; Hardy *v.* United States, 9 Ct. Cl. 244.

[115] Wilkinson *v.* Davies, 146 N. Y. 25, 40 N. E. 501.

[116] *Post*, § 633*f*

[117] *Missouri:* Simpson *v.* Ball, 145 Mo. App. 268, 129 S. W. 1017 (agreement to pay architect).

New York: Beattie *v.* New York & L. I. C. Co., 196 N. Y. 346, 89 N. E. 831 (agreement to quarry and shape stone; labor completed).

[118] *Indiana:* Lindley *v.* Dempsey, 45 Ind. 246.

boat for a given sum of money, the plaintiffs averred a readiness and offer to perform on their part, and a neglect and refusal on the part of the defendants to furnish the freight, and claimed to recover the entire sum specified in the agreement. But the Supreme Court of New York held that they were only entitled to recover what they had actually lost by the defendants' non-performance, saying: "Suppose the plaintiffs had the next hour been furnished with freight entirely adequate to the voyage at the same sum, they then would have been entitled to the damage arising from detention for that time, but no more. A tender and offer to perform is equivalent to performance, but merely for the purpose of sustaining an action; it is not performance, though in one respect it resembles it consequentially. It is *quasi performance*, but it does not regulate the amount of damages." [119]

* So, in Kentucky it has been held, that a plaintiff contracting to do work for a stipulated price, and who is ready to perform his agreement, but is prevented by the other party, cannot recover the price named in the contract for the whole work, but only the actual damages sustained by him. And as "the amount of compensation which the plaintiffs had recovered exceeded the value of the work they had done, and as, moreover, they did not attempt to prove any special loss or damage, they were not entitled to recover anything." ** [120]

The same rule applies where the consideration is paid by an employer in advance. The mechanic is not entitled in such case to retain the full price, even if the work is stopped by the default of his employer, but so much only as will compensate his actual damage.[121]

§ 612b. Settlement of amount due on contract prevented by defendant.

Where a sum is to be paid the ascertainment of which is con-

Kentucky: Powers *v.* Walker, 39 S. W. 256.

Michigan: Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

New York: Dunham *v.* Hastings P. Co., 95 App. Div. 390, 88 N. Y. Supp. 835.

[119] Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 460, 34 Am. Dec. 262.

[120] Chamberlin *v.* McCallister, 6 Dana (Ky.), 352. See, also, Caldwell *v.* Reed, Littell Sel. Cas. 366.

[121] Hood *v.* Raines, 19 Tex. 400.

tingent upon some action of the party who is to pay the money, and he refuses to co-operate in the ascertainment and is sued for such refusal, a difficulty arises in fixing the amount of damages. So where H, an inventor, sold certain inventions to the defendant, the consideration being one hundred shares of the defendant's stock, paid on the transfer of title; and its additional stock, not to exceed four hundred shares, to be paid defendant upon the award of arbitrators as to the value of the inventions as compared with those then in use. The defendant withdrew its submission, and H brought suit, claiming that the subsidiary contract embodied a condition subsequent, and that this having failed, the obligation to deliver the four hundred shares became absolute. But the Supreme Court held that the company had only agreed to pay the excess in value of the property (if any) to be ascertained in a particular way; that, having made this ascertainment impossible by their own act, they were liable on a *quantum valebat*, the value to be fixed by the jury.[122] The measure of damages was therefore what the jury should determine to be the excess, if any, of the value of the property, under the terms of the contract, when sold and delivered, over the value of the stock already received under it, with interest from the date of the revocation of the submission.[123] In Hopedale Electric Co. *v.* Electric Storage Battery Co.[124] the vendee purchased some electric properties (including a storage system) for a certain price, agreeing to pay an additional sum of $100,000, provided vendor's system should on a competitive test prove equal to that of the vendee; if five per cent better, $150,000; if ten per cent better, $350,000; if twenty per cent better, $500,000. The vendee prevented the application of the test. The vendor was held entitled to recover the *value of the contract.* On proof of equality between the two systems a verdict for $100,000 and interest was sustained. In

[122] This is the rule in sales. Benjamin on Sales, 7th ed. 558; Clark *v.* Westrope, 18 C. B. 765, where an outgoing tenant sold the straw on his farm to the incomer, at a price to be fixed by a valuation by two indifferent persons, but pending the valuation the buyer consumed the straw.

[123] Humaston *v.* Telegraph Co., 20 Wall. 20, 22 L. ed. 279.

[124] 39 App. Div. 491, 57 N. Y. Supp. 422, 132 N. Y. 348, 30 N. E. 381, 96 App. Div. 344, 89 N. Y. Supp. 325, 184 N. Y. 356, 77 N. E. 394, 198 N. Y. 588, 92 N. E. 1086.

the first case, performance having been rendered impossible, the only question was the value of the *property*, with which the vendor had parted under the contract; in the second, how much, under the stipulations of the contract, would the defendant have been obliged to pay on account of the equality or superiority of plaintiff's system.

§ 613. Recovery of the profits of a contract.

Whenever it can be proved that the performance of the contract would have been beneficial to the plaintiff, he may recover the profits of the contract in an action for the breach of it.[125] For the purpose of determining the application of this

[125] *United States:* Philadelphia, W. & B. R. R. *v.* Howard, 13 How. 307, 14 L. ed. 157; United States *v.* Speed, 8 Wall. 77, 19 L. ed. 449; United States *v.* Smith, 94 U. S. 214, 24 L. ed. 115; Hinckley *v.* Pittsburgh B. S. Co., 121 U. S. 246, 30 L. ed. 967, 7 Sup. Ct. 875; Cook *v.* Hamilton County, 6 McLean, 612; Greenwell *v.* Ross, 34 Fed. 656; Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; Safety I. W. & C. Co. *v.* Baltimore, 66 Fed. 140, 25 U. S. App. 166, 13 C. C. A. 375.

Alabama: Lecroy *v.* Wiggins, 31 Ala. 13; Mason *v.* Alabama Iron Co., 73 Ala. 270; George *v.* Cahawba & M. R. R., 8 Ala. 234.

California: Cunningham *v.* Dorsey, 6 Cal. 19; Coffee *v.* Meiggs, 9 Cal. 363; Hale *v.* Trout, 35 Cal. 229.

Colorado: Baldwin *v.* Central Sav. Bk., 17 Colo. App. 7, 67 Pac. 179.

Georgia: Atlanta & L. G. R. R. *v.* Hodnett, 29 Ga. 461; Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435.

Idaho: Harris *v.* Faris-Kesl Const. Co., 13 Ida. 211, 89 Pac. 760.

Illinois: Brigham *v.* Hawley, 17 Ill. 38; McClelland *v.* Snider, 18 Ill. 58; Springdale C. A. *v.* Smith, 24 Ill. 480; Evans *v.* Chicago & R. I. R. R., 26 Ill. 189; Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.

Indiana: Herbert *v.* Stanford, 12 Ind. 503; Fairfield *v.* Jeffreys, 68 Ind. 578; Cincinnati, I., St. L. & C. Ry. *v.* Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

Iowa: Richmond *v.* Dubuque & S. C. R. R., 40 Ia. 264.

Kentucky: Thompson *v.* Jackson, 14 B. Mon. 114; Elizabethtown & P. R. R. *v.* Pottinger, 10 Bush, 185.

Maryland: Eckenrode *v.* Chemical Co., 55 Md. 51.

Massachusetts: Fox *v.* Harding, 7 Cush. 516; Somers *v.* Wright, 115 Mass. 292; Jewett *v.* Brooks, 134 Mass. 505.

Michigan: Burrell *v.* New York & S. S. S. Co., 14 Mich. 34; Loud *v.* Campbell, 26 Mich. 239; Grand Rapids & B. C. R. R. *v.* Van Dusen, 29 Mich. 431; Goodrich *v.* Hubbard, 51 Mich. 62, 16 N. W. 232; Leonard *v.* Beaudry, 68 Mich. 312, 36 N. W. 88, 13 Am. St. Rep. 344.

Minnesota: Morrison *v.* Lovejoy, 6 Minn. 319; Ennis *v.* Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314.

Missouri: Crescent Mfg. Co. *v.* Nelson Mfg. Co., 100 Mo. 325.

Nebraska: Hale *v.* Hess, 30 Neb. 42, 46 N. W. 261.

New Jersey: Boyd *v.* Meighan, 48 N. J. L. 404, 4 Atl. 778; Holt *v.* United Security L. I. & T. Co., 76 N. J. L. 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691.

New York: Masterton *v.* Mayor, 7

rule contracts may be divided into two classes; first, where the contract secured the doing of work or the giving of property on the one hand for a contract price to be paid in money on the other; second, where there is an exchange of property or of services, no contract price being payable in money on either side. These two classes of cases will be considered separately.

§ 614. Contracts in which a contract price is fixed: plaintiff to perform an act.

Where a contract price is fixed in the contract, this becomes the standard of value of the contract, the profit being the difference between the contract price and the cost or value of performance. The application of this rule may be examined in cases of several sorts.

In the first class of cases the plaintiff on his side undertakes to perform some act for the defendant and in return the defendant agrees to pay money for the plaintiff's act. In such

Hill, 61, 42 Am. Dec. 38; Cramer *v.* Metz, 57 N. Y. 659; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Reed *v.* McConnell, 101 N. Y. 270.

North Carolina: Wilkinson *v.* Dunbar, 149 N. C. 20, 62 S. E. 748.

Pennsylvania: Hoy *v.* Gronoble, 34 Pa. 9, 75 Am. Dec. 628; Addams *v.* Tutton, 39 Pa. 447; Imperial C. & C. Co. *v.* Port Royal C. & C. Co., 138 Pa. 45, 20 Atl. 937.

Rhode Island: Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Tennessee: Singleton *v.* Wilson, 85 Tenn. 344.

Texas: Porter *v.* Burkett, 65 Tex. 383; Osborne *v.* Ayres (Tex. Civ. App.), 32 S. W. 73.

Vermont: Curtis *v.* Smith, 48 Vt. 116; Morey *v.* King, 49 Vt. 304.

Virginia: Kendall B. N. Co. *v.* Commissioners of Sinking Fund, 79 Va. 563.

Washington: Perolin Co. *v.* Young, 118 Pac. 1.

West Virginia: Barrett *v.* Raleigh, C. & C. Co., 55 W. Va. 395, 47 S. E. 154.

Wisconsin: Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408; Cameron *v.* White, 74 Wis. 425, 43 N. W. 155; Muenchow *v.* Roberts, 77 Wis. 520, 46 N. W. 802.

In a few cases it is said that the recovery of profits of a contract should not be allowed, on the ground that profits are not generally recoverable. This is confusing two separate things; collateral profits of another undertaking, claimed to have been lost through breach of the contract, and profits of the contract itself. The loss of collateral profits is always consequential, and cannot be recovered if it is either remote, unforeseen, or uncertain; the loss of the profits of the contract is direct loss, and is always recoverable if it can be proved with sufficient certainty.

"Wherever profits are spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or states of the market, is referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost." Curtis, J., in Philadelphia, W. & B. R. R. *v.* Howard, 13 How. 307, 344, 14 L. ed. 307.

a case the profit of the contract is represented by the contract price less the cost of performing the act to be done by the plaintiff.[126] In estimating the cost of performance there should,

[126] *Construction contracts:* Contract price less cost of construction recoverable.

Buildings:

Illinois: Allphin *v.* Working, 132 Ill. 484, 24 N. E. 54.

Louisiana: Seaton *v.* New Orleans Second Municipality, 32 La. Ann. 44.

Minnesota: Swanson *v.* Andrus, 83 Minn. 505, 86 N. W. 465.

Nebraska: Kreamer *v.* Irwin, 46 Neb. 827, 65 N. W. 885.

New Jersey: Boyd v. Meighan, 48 N. J. L. 404, 4 Atl. 788.

New York: Danolos *v.* State, 89 N. Y. 36, 42 Am. Rep. 277 (public buildings); Baker *v.* State, 77 App. Div. 528, 78 N. Y. Supp. 922.

South Carolina: Feaster *v.* Richland Cotton Mills, 51 S. C. 143, 28 S. E. 301.

Texas: Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

Work on or about buildings:

Alabama: Peck-Hammond Co. *v.* Heifner, 136 Ala. 473, 33 So. 807 (to put heating apparatus in building).

Arkansas: Gibney v. Turner, 52 Ark. 117, 12 S. W. 201.

Indiana: Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Louisiana: Lynch *v.* Sellers, 41 La. Ann. 375, 6 So. 561.

Nebraska: Jewett *v.* Wilmot, 51 Neb. 700, 71 N. W. 775.

New York: Wieser *v.* Times R. & C. Co., 110 N. Y. Supp. 963 (to build floor); Goldstein *v.* Godfrey Co., 61 Misc. 64, 113 N. Y. Supp. 123 (to install fixtures); Kenny *v.* Knickerbocker B. & Y. Co., 136 App. Div. 568, 121 N. Y. Supp. 59 (to install machinery); Miller *v.* Loncao, 127 N. Y. Supp. 90 (to paint).

Wisconsin: Spafford *v.* McNally, 130 Wis. 537, 110 N. W. 387 (to do brickwork and plastering).

Railroads:

United States: Phila., W. & B. R. R. *v.* Howard, 13 How. 307, 14 L. ed. 307; Myers *v.* York & C. R. R., 2 Curt C. C. 28.

Alabama: George *v.* Cahawba & M. R. R., 8 Ala. 234; Danforth *v.* Tennessee & C. R. R., 93 Ala. 614, 11 So. 60.

Indiana: Chicago & S. E. Ry. *v.* Yawger, 24 Ind. App. 460, 56 N. E. 50.

Kentucky: Williams *v.* Yates, 113 S. W. 503 (to set piling).

Michigan: Grand Rapids & B. C. R. R. *v.* Van Dusen, 29 Mich. 431.

Tennessee: Smith *v.* O'Donnell, 8 Lea, 468.

Bridges:

United States: Insley *v.* Shepard, 31 Fed. 869; Harvey *v.* United States, 8 Ct. Cl. 501.

Indiana: Cincinnati & C. Ry. *v.* Lutes, 112 Ind. 276, 11 N. E. 784.

Other structures:

United States: Myerle *v.* United States, 31 Ct. Cl. 105 (vessel); Safety I. W. & C. Co. *v.* Baltimore, 66 Fed. 140, 13 C. C. A. 375 (conduits for cables).

California: McConnell *v.* Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171 (tunnel).

Wisconsin: Conway v. Mitchell, 97 Wis. 290, 72 N. W. 752 (monument).

Logging contracts: Plaintiff recovers contract price less cost of getting out, transporting or sawing the timber.

Contracts to cut and deliver:

Arkansas: Ingham L. Co. *v.* Ingersoll, 93 Ark. 447, 125 S. W. 139.

Kentucky: Blood *v.* Herring, 22 Ky. L. Rep. 1725, 61 S. W. 273; Horn *v.* Carroll, 25 Ky. L. Rep. 2305, 80 S. W. 518.

Michigan: Atkinson *v.* Morse, 63 Mich. 276, 29 N. W. 711; Rayburn *v.* Comstock, 80 Mich. 448, 45 N. W.

according to the better view, be included a reasonable allowance for the risk and responsibility of performing; and a reasonable deduction from the contract price to cover such risk

378; Lee *v.* Briggs, 99 Mich. 487, 58 N. W. 477; Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 26.

New Hampshire: Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456.

North Carolina: Hawk *v.* Pine L. Co., 149 N. C. 10, 62 S. E. 752.

Texas: Carrico *v.* Stevenson (Tex. Civ. App.), 135 S. W. 260.

West Virginia: Patton *v.* Elk R. N. Co., 13 W. Va. 259.

Wisconsin: Salvo *v.* Duncan, 49 Wis. 151, 4 N. W. 1074.

Contracts to transport:

Alabama: Bonifay v. Hassell, 100 Ala. 269, 14 So. 46; Griffin *v.* Ogletree, 114 Ala. 343, 21 So. 488.

Minnesota: Pevey *v.* Schulenberg & B. L. Co., 33 Minn. 45, 21 N. W. 844; Glaspie *v.* Glassow, 28 Minn. 158, 9 N. W. 669.

New York: Durkee *v.* Mott, 8 Barb. 423.

Texas: Long *v.* McCauley, 3 S. W. 689.

Vermont: Gibson *v.* Wheldon, 82 Vt. 175, 72 Atl. 909.

Wisconsin: Corbett *v.* Anderson, 85 Wis. 218, 54 N. W. 727.

Contracts to saw:

Alabama: Robinson *v.* Bullock, 66 Ala. 548.

Arkansas: Beekman L. Co. *v.* Kittrell, 80 Ark. 228, 96 S. W. 988 (to plane); Hurley *v.* Oliver, 91 Ark. 427, 121 S. W. 920; Singer Mfg. Co. *v.* Reeves L. Co., 129 S. W. 805.

California: Winans *v.* Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952.

Kentucky: Blood *v.* Herring, 61 S. W. 273, 22 Ky. L. Rep. 1725.

Louisiana: Barnette S. M. Co. *v.* Fort Harrison L. Co.,126 La. 75, 52 So. 222 (to take output of mill).

Michigan: Leonard *v.* Beaudry, 68 Mich. 312, 26 N. W. 88, 13 Am. St. Rep. 344; Fell *v.* Newberry, 106 Mich. 542, 64 N. W. 474; Barrett *v.* Grand Rapids Veneer Works, 110 Mich. 6, 67 N. W. 976.

New York: Snell *v.* Remington Paper Co., 102 App. Div. 138, 92 N. Y. Supp. 343.

Wisconsin: Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408.

Contracts to do work on land: contract price less cost of work recovered.

To mine coal:

Kentucky: Sagamore Coal Co. *v.* Clark, 109 S. W. 349, 33 Ky. L. Rep. 134.

West Virginia: Smith *v.* Atlas P. C. Co., 66 W. Va. 599, 66 S. E. 746.

To drill for oil or gas:

Kansas: Fredonia Gas Co. *v.* Bailey, 77 Kan. 296, 94 Pac. 258.

Kentucky: New Domain O. & C. Co. *v.* Feeley, 107 S. W. 1185, 32 Ky. L. Rep. 1181.

Ohio: Leffler *v.* Witten, 76 Oh. St. 632, 81 N. E. 1189, affirming 28 Oh. C. Ct. 533.

To do other work:

Colorado: McClair *v.* Austin, 17 Colo. 576, 31 Pac. 225, 31 Am. St. Rep. 340 (to grade lawns and plant shade trees).

Delaware: Truitt *v.* Fahey, 3 Penn. 573, 52 Atl. 339 (to build road).

Michigan: Burrell *v.* New York & S. Salt Co., 14 Mich. 34 (to construct vats).

New Jersey: Ryan *v.* Remmey, 57 N. J. L. 474, 31 Atl. 766 (to remove clay from defendant's beds).

New York: Riley *v.* Black, 1 N. Y. Misc. 288, 20 N. Y. Supp. 695 (to remove rock).

Tennessee: Singleton *v.* Wilson, 85 Tenn. 344, 2 S. W. 801 (to build dam).

Texas: Campbell *v.* Howerton (Tex. Civ. App.), 87 S. W. 370 (to clear land).

Washington: Watson *v.* Gray's H. B.

and responsibility should be made wherever the amount of risk and responsibility would have been appreciable.[127] The profit is to be arrived at by considering what the cost would be to the plaintiff, not to any ordinary person nor to the defendant. If the plaintiff was in a position to perform the contract at a very small cost, the profit of the contract is larger on that account.[128] So where the plaintiff agreed to furnish

Co., 3 Wash. 283, 28 Pac. 527 (to sink well).

Wisconsin: Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1 (to pull stumps).

Contract for board and lodging: plaintiff recovers contract price less value of lodging and cost of board. Wilkinson *v.* Davies, 146 N. Y. 25, 40 N. E. 501; Wetmore *v.* Jaffray, 9 Hun, (N. Y.), 140; Lydecker *v.* Valentine, 71 Hun, 194, 24 N. Y. Supp. 567; Strakosch *v.* Wray, 6 Misc. 207, 26 N. Y. Supp. 537; Crane *v.* Powell, 19 N. Y. Supp. 220; Thayer *v.* Hamlin, 59 Misc. 171, 110 N. Y. Supp. 244; Ashton *v.* Margolies, 129 N. Y. Supp. 617.

Contract for work: contract price less cost of doing the work recoverable.

United States: United States *v.* Speed, 8 Wall. 77, 9 L. ed. 449 (to pack hogs); The Gazelle & Cargo, 128 U. S. 487, 32 L. ed. 496, 9 Sup. Ct. 139 (to transport goods); Dalbeattie S. Co. *v.* Card, 59 Fed. 159 (*ibid*); Lincoln *v.* Orthwein, 120 Fed. 880 (to do stevedore work).

Arkansas: St. Louis, A. & T. Ry. *v.* Beard, 56 Ark. 309, 29 S. W. 146 (to print time-tables).

Georgia: Pope *v.* Graniteville Mfg. Co., 1 Ga. App. 176, 57 S. E. 949 (to finance and store a cotton crop).

Massachusetts: Magnolia Metal Co. *v.* Gale, 189 Mass. 124, 75 N. E. 219 (to maintain office: office expenses deducted from contract price).

Mississippi: Friedlander *v.* Pugh, 43 Miss. 111, 5 Am. Rep. 478 (to do work).

Missouri: Wiggins Ferry Co. *v.* Chicago & A. R. R., 73 Mo. 389, 39 Am. Rep. 519 (to do all defendant's ferrying); Hume *v.* Hale, 146 Mo. App. 659, 125 S. W. 811 (to pay rent in work).

New York: Cramer *v.* Metz, 57 N. Y. 659 (to manufacture goods); Baker Transfer Co. *v.* Merchants' R. & I. M. Co., 12 App. Div. 260, 42 N. Y. Supp. 76 (to deliver defendant's ice to his customers); Ashkanazy *v.* Sachs, 110 N. Y. Supp. 929 (to press clothing); Thacke *v.* Hernsheim, 115 N. Y. Supp. 216 (to do iron work).

Pennsylvania: Nixon *v.* Myers, 141 Pa. 477, 21 Atl. 670 (to do hauling).

Texas: Porter *v.* Burkett, 65 Tex. 383 (to use mule teams in work for defendant).

Vermont: Parker *v.* McKannon, 76 Vt. 96, 56 Atl. 536 (to make and supply musical instruments for sale by defendant).

Virginia: Kendall B. N. Co. *v.* Commissioners of Sinking Fund, 79 Va. 563 (to engrave bonds).

Washington: General L. & P. Co. *v.* Washington Rubber Co., 55 Wash. 461, 104 Pac. 650 (to print).

West Virginia: Electric S. & C. Co. *v.* Consolidated L. & R. Co., 42 W. Va. 583, 26 S. E. 188 (to repair machinery).

[127] *United States:* United States *v.* Speed, 8 Wall. 77, 19 L. ed. 449; Insley *v.* Shepard, 31 Fed. 869.

Alabama: Danforth *v.* Tennessee & C. R. R., 93 Ala. 614, 11 So. 60.

New York: McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417.

[128] Campbell *v.* Howerton (Tex. Civ. App.), 87 S. W. 370.

and set up a motor for the defendant he was allowed to show the price at which he had secured a second-hand motor which would have answered the purpose of the contract.[129]

Therefore when the plaintiff has made an advantageous sub-contract by which he was to secure the performance by another at a cost much below the contract price, it would seem that he should be allowed to show this, and to recover the difference between the contract price and the sub-contract price, allowing, however, a fair amount on account of his relief from the responsibility and trouble of himself performing.[130]

In several cases, however, it has been said that the cost to the plaintiff of sub-contracts could not be shown.[131] In these decisions the courts intended to follow the rule laid down in the leading case of Masterton *v.* Mayor of Brooklyn.[132] In that case, however, the court was not dealing with an offer by the plaintiff to show the sub-contract price as evidence of the cost to the plaintiff of performing his own contract. The plaintiff was endeavoring to recover from the defendant the damages he would be obliged to pay to the sub-contractor for breach of the sub-contract. Allowing this the trial court had charged that the plaintiff could recover the difference between the contract price and the cost *to the sub-contractor*, of performance, thus giving both the profits of the contract in suit and of the sub-contract. This was held error on two grounds: first, that the sub-contract was not within the contemplation of the parties; second, that it was not certainly proved that the consequence of defendant's breach of contract was a breach of the sub-contract. If the view of the matter stated above is correct, cases denying the admissibility of the sub-contract price are wrongly decided.

When the defendant not only refuses to allow the plaintiff to do the work, but also secures another to do it at a less price,

[129] Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622.

[130] *United States:* Floyd *v.* U. S., 2 Ct. Cl. 429; affirmed, U. S. *v.* Floyd, 8 Wall. 77, 19 L. ed. 449.

Alabama: Tennessee & C. R. R. *v.* Danforth, 112 Ala. 80, 20 So. 502.

[131] *United States:* Stout *v.* United States, 27 Ct. Cl. 385; Barlow *v.* United States, 35 Ct. Cl. 514.

New York: Levenson *v.* Bollowa, 42 Misc. 201, 85 N. Y. Supp. 386; Story *v.* New York & H. R. R., 6 N. Y. 85.

[132] 7 Hill (N. Y.), 61, 42 Am. Dec. 38.

the plaintiff may, it would seem, recover as the value of the contract the difference between the price he was to receive and the cost to the defendant of the substituted work.[133]

§ 615. Cost of partial performance.

When the contract has been partly performed, the plaintiff upon a breach of it loses more than the mere value of the contract; he has not only lost the benefit of the contract, but he has also lost the expense of partial performance on his own part. He may gain some benefit from this partial performance, as by the value of the material left on his hands; but this loss is greater than the profits of the contract by an amount equal to the net expense of the partial performance, after deducting the benefit of such partial performance to himself. So if the plaintiff on completion was to receive payment of a contract price, he may recover upon breach the profits of the contract (that is, the contract price less the cost of complete performance), and in addition the net cost of the partial performance.[134]

[133] *Georgia:* Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. 216 (to build a railroad).

New Jersey: Ryan *v.* Remmey, 57 N. J. L. 474, 31 Atl. 766 (to remove clay from defendant's beds).

In Michigan Paving Co. *v.* Detroit, 34 Mich. 201, the plaintiff contracted with the defendant city to pave a street. The city under a right reserved in the contract declared it forfeited after part performance. Plaintiff claimed he was entitled to all of the original contract price except what the city paid another contractor for completing the work; but *held*, this was not so since the city might have made a more beneficial contract the second time.

[134] *Contracts of construction:* plaintiff recovers profits plus cost of labor and materials furnished.

Houses:

Georgia: L. Campbell & Co. *v.* Mion, 6 Ga. App. 134, 64 S. E. 571.

Louisiana: Dugue *v.* Levy, 114 La. 21, 37 So. 995

Maryland: Black *v.* Woodrow, 39 Md. 194.

Nebraska: Van Dorn *v.* Mengedoht, 41 Neb. 525, 59 N. W. 800.

Railroads:

United States: Hambly *v.* Delaware, M. & V. R. R., 21 Fed. 541.

Alabama: Danforth *v.* Tennessee & C. R. R., 93 Ala. 614, 11 So. 60.

Kentucky: Elizabethtown & P. R. R. *v.* Pottinger, 10 Bush, 185.

Maryland: Bush *v.* Baltimore & C. Constr. Co., 88 Md. 665, 41 Atl. 1092.

Other structures:

Mississippi: Vicksburg Water Supply Co. *v.* Gorman, 70 Miss. 360, 11 So. 680 (waterworks).

Contracts to do work: Plaintiff recovers profits plus cost of the work done.

California: Cunningham *v.* Dorsey, 6 Cal. 19 (to deliver logs at mill) Cederberg *v.* Robinson, 100 Cal. 93, 34 Pac. 625 (to harvest grain).

Kentucky: Haggin *v.* Price, 8 Dana, 48 (to board the plaintiff).

Minnesota: Glaspie *v.* Glassow, 28 Minn. 158, 9 N. W. 669 (to drive logs).

The simplest method of finding the damages in such a case is to subtract from the contract price the cost of completing performance by the plaintiff;[135] subtracting, however, from this amount the value of the partial performance to the plaintiff.[136]

If some portion of the contract had been so far completed that the contract itself furnishes a price for such partial performance, the plaintiff should recover the contract price for this completed portion and the profits lost on the remainder of the contract.[137] And it is sometimes held that where a

Texas: Dunham *v.* Orange L. Co. (Tex. Civ. App.), 125 S. W. 89 (to save stranded logs).

Washington: Anderson *v.* Hilker, 38 Wash. 632, 80 Pac. 848 (to move building).

[135] *United States:* Altoona E. E. & S. Co. *v.* Kittanning & F. C. St. Ry., 126 Fed. 559 (to equip electric railway; plaintiff prevented from equipping a portion; recovers contract price less cost of equipping such portion).

Kentucky: Blood *v.* Herring, 22 Ky. L. Rep. 1725, 61 S. W. 273 (to saw lumber; subtract cost of sawing the remainder from contract price).

Maine: Morgan *v.* Hefler, 68 Me. 131 (to build a stable).

Maryland: Baltimore & O. R. R. *v.* Stewart, 79 Md. 487, 29 Atl. 964 (to build bridge; plaintiff recovers contract price less cost of completion).

Minnesota: Ennis *v.* Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314 (to do work).

Missouri: Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 646 (to build section of railroad; subtract cost of completion from contract price); Park *v.* Kitchen, 1 Mo. App. 357 (to construct a building).

New York: Devlin *v.* Mayor of New York, 63 N. Y. 8 (to clean streets); Dunn *v.* Allen, 59 App. Div. 561, 67 N. Y. Supp. 218 (to use boats and horses in work on canal; subtract expense of complete performance from contract price).

Ohio: Toledo *v.* Libbie, 19 Ohio C. Ct. 704 (to build sidewalks; plaintiff recovers contract price less cost of completing).

Wisconsin: Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979 (to cut and deliver logs; contract price less cost of cutting and hauling remaining logs recoverable.

[136] *Arkansas:* Gibney *v.* Turner, 52 Ark. 117, 12 S. W. 201 (to build house; plaintiff recovers contract price less labor and material required to complete the contract, subtracting, however, the value of the material on hand).

Georgia: Mimms *v.* J. L. Betts Co. (Ga. App.), 72 S. E. 271.

New York: Thomas *v.* Cauldwell, 26 N. Y. Supp. 785 (to build printing press of unusual size, of no value to anyone but defendant: contract price recoverable, less cost of completion, subtracting value of press as old metal).

Vermont: Allen *v.* Thrall, 36 Vt. 711 (to manufacture machines; subtract cost of completion, together with the value of unfinished machines left on plaintiff's hands, from contract price).

So when plaintiff contracted to furnish five brown stone stoops for houses of the defendant, and after cutting the stone defendant prevented performance, plaintiff was not entitled to recover the cost of repairing the stoops without evidence that the work of preparation was useless. Miller *v.* Hahn, 23 App. Div. 48, 48 N. Y. Supp. 346.

[137] *United States:* Moore *v.* U. S., 17

single contract has been partially performed the plaintiff may recover a portion of the contract price proportional to the amount performed plus the proportional part of the profit upon the portion unperformed.[138]

§ 616. Cost of partial performance where no profits proved: doctrine of United States v. Behan.

If the plaintiff cannot or does not prove that any profits would have been earned by a full performance, he may nevertheless recover the expense of the partial performance.[139] So

Ct. Cl. 17 (to manufacture and supply 600,000 brick; plaintiff recovers difference between contract price of brick manufactured and what they could be sold for plus difference between contract price of the remainder and what they could be manufactured for); Ferris *v.* U. S., 27 Ct. Cl. 542 (to dredge, at fixed price per cubic yard; contract price of amount dredged plus profits on work not done recoverable).

California: Hale *v.* Trout, 35 Cal. 229 (to deliver lumber at certain price; contract price of lumber delivered plus profits on lumber not accepted recoverable); Upstone *v.* Weir, 54 Cal. 124 (to manufacture and deliver iron work; plaintiff recovers contract price of part delivered plus profits on the balance).

Connecticut: Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382 (to transport lumber).

Iowa: Dibol *v.* Minott, 9 Ia. 403 (to paint ten houses for $70 each; broken after several houses painted. Plaintiff recovers $70 for each house painted, and profits on houses not painted).

Missouri: Gabriel *v.* Akinsville Pressed Brick Co., 57 Mo. App. 520 (to drive a well at a fixed price per foot; plaintiff recovers agreed price for distance driven, and difference between contract price and cost for the remaining distance).

New Jersey: Kehoe *v.* Rutherford, 56 N. J. L. 23, 27 Atl. 912 (to grade and build a road; plaintiff recovers contract price for the portion graded, plus the profits of remaining work); Sullivan *v.* Moffatt, 70 N. J. L. 4, 56 Atl. 304 (to supply and set marble in a building; proper proportion of the contract price plus profits of remaining work recoverable).

Texas: Houston & T. C. Ry. *v.* Mitchell, 38 Tex. 85 (to cut and deliver hay); Duncan *v.* Johnson (Tex. Civ. App.), 59 S. W. 46 (to build house; plaintiff recovers contract price for part done plus profit on remainder).

[138] *Illinois:* Demme & Dierkes Furniture Co. *v.* McCabe, 49 Ill. App. 453.

Iowa: McCausland *v.* Cresap, 3 Greene, 161.

Nebraska: Thompson *v.* Gaffey, 52 Neb. 317, 72 N. W. 314 (to do plumbing in house).

New Jersey: Wilson *v.* Borden, 68 N. J. L. 627, 54 Atl. 815 (to build a house).

Washington: Noyes *v.* Pugin, 2 Wash. 653, 27 Pac. 548 (to serve as architect).

[139] *United States:* Sperry & Hutchinson Co. *v.* O'Neill Adams Co., 185 Fed. 231, 000 C. C. A. 000.

Missouri: Ragland *v.* Conqueror Zinc Cos., 136 Mo. App. 631, 118 S. W. 1194 (to sublease land for mining).

New Jersey: Holt *v.* United S. L. I. & T. Co., 76 N. J. L. 585, 72 Atl. 301.

Pennsylvania: In re Carroll's Estate, 219 Pa. 440, 68 Atl. 1038 (to adopt).

Texas: Ball *v.* Britton, 58 Tex. 57 (to enter into partnership).

where the plaintiff agreed to drive a well at an agreed price per foot, but the number of feet was not agreed upon, and the contract was broken after partial performance, he was allowed to recover the cost of partial performance.[140] And where plaintiff agreed to take care of deceased during life and deceased agreed to leave him property by will, the latter agreement being too indefinite to enforce, the plaintiff may recover the value of his services.[141]

This principle is illustrated by the leading case of United States *v.* Behan.[142] In this case the claimant was the surety for one Roy upon a contract between Roy and the United States to improve the harbor of New Orleans, and later, upon the contract with Roy being annulled, the claimant was authorized to fulfil the contract. He went to expense in providing machinery and materials and did a portion of the work and after this part performance the government finally cancelled the contract. The claimant thereupon sold the materials on hand. The Court of Claims allowed him for his actual expenditures in the prosecution of the work together with the unavoidable losses on materials. It did not appear whether a profit would have been made or not by a performance of the contract. The government appealed on the ground that by making a claim for profits the claimant asserted the existence of the contract and could recover only nominal damages if he was unable to show that a profit would have been made. The Supreme Court, however, speaking by Justice Bradley, affirmed the decision of the Court of Claims on the ground that in a case of this sort the claimant should at least be made whole for his losses even though he did not prove what the profits of the contract would be.

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will

[140] *Iowa:* Thompson *v.* Brown, 106 Ia. 367, 76 N. W. 819.
Minnesota: Olson *v.* Nonenmacher, 63 Minn. 425, 65 N. W. 642.

[141] Shakespeare *v.* Markham, 10 Hun (N. Y.), 311.

[142] 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81.

consist of two distinct items on grounds of damage, namely: first,what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *v.* Mayor of Brooklyn,[143] they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

"The rule as stated in Speed's case is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damages—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's case, and his *profits* will be measured by 'the difference between the cost of doing the work and what he was to receive for it,' etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon showing of losses. The two heads of damage are distinct, though closely related. When profits are sought, a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits."

[143] 7 Hill (N. Y.), 69.

If the cost of partial performance is recovered there can be no recovery for profits, and if the profits can be proved with sufficient certainty for recovery the cost of partial performance cannot be allowed. In no case can both be recovered.[144]

§ 617. Contracts in which a contract price is fixed: plaintiff to deliver property.

If the plaintiff agrees to deliver something to the defendant and the defendant on his part agrees to pay money for it, then the profit of the contract is to be measured by the contract price less the value of the property to be delivered by the plaintiff.[145]

[144] Tygart *v.* Albritton, 5 Ga. App. 412, 63 S. E. 521.

[145] The typical example of this sort of contract is a sale of chattels by the plaintiff to the defendant, which will be considered in a separate chapter. *Post,* chap. xxxv. And where there is not a technical contract of sale but the plaintiff contracts for a certain sum of money to do work in making or procuring property and then to deliver the property to defendant, the plaintiff recovers as the profits of the contract the contract price less the cost of procuring and delivering the property.

Contract to supply an article: Contract price less cost of supplying recoverable.

United States: Floyd *v.* United States, 8 Wall. 77, 19 L. ed. 449 (affirming 2 Ct. Cl. 429); United Engineering & C. Co. *v.* Broadnax, 136 Fed. 351, 69 C. C. A. 177; H. T. Smith Co. *v.* Minetto-Meriden Co., 168 Fed. 777 (to let teams); Stout *v.* United States, 27 Ct. Cl. 385 (material for building).

Alabama: Peck-Hammond Co. *v.* Heifner, 136 Ala. 473, 33 So. 807 (to put in heating apparatus); Wheeler *v.* Cleveland, 54 So. 277 (to sell standing timber).

California: Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020 (to supply annual ice crop).

Colorado: Kilpatrick *v.* Inman, 46 Colo. 514, 105 Pac. 1080, 26 L. R. A. (N. S.) 188 (to let "livery rig" with driver).

Indiana: Indiana Canning Co. *v.* Priest, 16 Ind. App. 445, 45 N. E. 618 (to supply plaintiff's crop of tomatoes).

Kentucky: Hollerbach & M. C. Co. *v.* Wilkins, 130 Ky. 51, 112 S. W. 1126 (to supply broken stone).

Louisiana: Avery *v.* Segura Sugar Co., 111 La. 891, 35 So. 967 (to supply plaintiff's sugar crop).

Maryland: Furstenburg *v.* Fawsett, 61 Md. 184 (defendant to cut and carry away plaintiff's standing wood).

Minnesota: Silberstein *v.* Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622 (to set up electric motor).

Missouri: Chapman *v.* Kansas City, C. & S. Ry., 146 Mo. 481, 48 S. W. 646 (to deliver railroad ties).

Nebraska: Hale *v.* Hess, 30 Neb. 42, 46 N. W. 261 (to provide and set up furnace).

New York: McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417 (to provide material for building).

Oregon: American B. & C. Co. *v.* Bullen B. Co., 29 Ore. 549, 46 Pac. 138 (to provide material for building).

Texas: Watkins *v.* Junker, 4 Tex. Civ. App. 629, 23 S. W. 802 (to supply boats for dredging canal; plaintiff recovers difference between rental value and contract price).

Contracts to manufacture: Plaintiff

§ 618. Contracts in which a contract price is fixed: defendant to perform an act or deliver property.

If the plaintiff was to pay an agreed price for work to be done or property to be delivered by the defendant, the profit of the contract to the plaintiff is measured by the value of defendant's performance less the contract price; [146] or if he has paid part of the price, he recovers the difference plus the partial pay-

recovers contract price less cost of manufacture.

United States: Hinckley *v.* Pittsburgh B. S. Co., 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. 875.

Missouri: Crescent Mfg. Co. *v.* N. O. Nelson Mfg. Co., 100 Mo. 325, 13 S. W. 503 (barbed wire).

South Carolina: Millar *v.* Hilliard, Cheves, 149 (bread: deduct value of bread left on plaintiff's hands).

Virginia: Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988 (steel doors).

Wisconsin: Walsh *v.* Myers, 92 Wis. 397, 66 N. W. 250 (lye cans).

In Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339, the defendant contracted to purchase the plaintiff's entire supply of milk; and the measure of damages for the breach was held to be the contract price less the wholesale price of milk, rather than the cost of production. For if the contract had been carried out, since his whole supply was contracted for, he could have sold none at the wholesale price; and any profit he might make after breach by selling at wholesale is earned only as a result of the breach, and should therefore reduce by that amount the damages which would otherwise be recoverable.

[146] This is the rule of damages for breach by the seller of a contract for the sale of chattels. *Post*, chap. xxxv. And the same rule may be applied in the case of other contracts for delivery of property.

Alabama: Northen *v.* Tatum, 164 Ala. 368, 51 So. 17 (to cut plaintiff's timber and manufacture it into shingles; difference between value of the timber when cut and made into shingles, less cost of doing so, and its value standing).

Arkansas: Ford H. L. Co. *v.* Clement, (Ark.), 135 S. W. 343 (to supply lumber for plaintiff's mill; profits of the contract).

Connecticut: Cohn *v.* Norton, 57 Conn. 480, 5 L. R. A. 572, 18 Atl. 595 (to lease a building; difference between the agreed rent and value of the term).

Illinois: World's Columbian Exposition Co. *v.* Pasteur-Chamberland Filter Co., 82 Ill. App. 94 (to allow defendant to advertise in plaintiff's park; value of advertising minus the contract price).

New York: Bean *v.* Carleton, 51 Hun, 318 (to publish book for plaintiff; recovers loss through not having book published); Nash *v.* Thousand Islands S. B. Co., 123 App. Div. 148, 108 N. Y. Supp. 336 (to let plaintiff the exclusive checking, news, confectionery, and view privileges on defendant's fleet of steamers; difference between actual value of the privileges and the contract price); Hirsh *v.* Press Pub. Co., 141 App. Div. 357, 126 N. Y. Supp. 298 (breach of contract by which plaintiff was to remove iron from a building for a certain price; defendant refused to allow him to remove it. Measure of damages, difference between the value of the iron after removal and the contract price plus the cost of removal. Cannot recover damages based on favorable contracts plaintiff might have made with other parties).

ment.[147] If no profits can be shown he recovers at least his partial payments and other expenditures.[148]

In such a case, however, the value of the performance by the defendant can ordinarily be established only by showing the cost of securing preformance elsewhere. The measure of damages, as ordinarily stated, is the cost of securing performance of the work elsewhere, less the contract price.[149] If the contract

[147] Barr *v.* Henderson, 105 La. 691, 30 So. 158.

[148] *Kansas:* King *v.* Perfection B. M. Co., 81 Kan. 809, 106 Pac. 1071 (to supply machinery; partial payment, prepayment of freight, and expense of special construction of building to receive machinery).

Kentucky: Corbin O. & G. Co. *v.* Mull, 123 Ky. 763, 30 Ky. L. Rep. 91, 97 S. W. 385 (to drill oil well; no profits being proved, partial payments).

New York: Deluise *v.* Long Island R. R., 65 App. Div. 487, 72 N. Y. Supp. 988 (lease of boot-blacking privilege; rent paid in advance); Tabak *v.* Fettner, 139 App. Div. 248, 123 N. Y. Supp. 982 (actual value of ice-box given by plaintiff at an arbitrary valuation as part payment of contract price).

[149] *United States:* Goldsboro *v.* Moffett, 49 Fed. 213 (to build waterworks; plaintiff recovers price at which the contract was let on a second bidding less the original price).

Alabama: O'Brien *v.* Anniston Pipe Works, 93 Ala. 582, 9 So. 415 (to do excavation and grading. The fact that part of the work was done at a cheaper rate than the agreed rate is immaterial; the result of securing performance of the whole contract fixes the damages).

Delaware: Hartnett *v.* Baker, 4 Pennew. 431, 56 Atl. 672 (to grow and supply tomatoes).

Illinois: Tribune Co. *v.* Bradshaw, 20 Ill. App. 17 (to insert advertisement in a newspaper; difference between cost of inserting a similar advertisement in another paper and the contract price recoverable).

Kentucky: Corbin O. & G. Co. *v.* Mull, 123 Ky. 763, 97 S. W. 385, 30 Ky. L. Rep. 91 (to drill oil well).

Massachusetts: Weed *v.* Draper, 104 Mass. 28 (to build machines); Florence M. Co. *v.* Daggett, 135 Mass. 582 (to make castings for stoves).

New Hampshire: Lamoreaux *v.* Rolfe, 36 N. H. 33 (to haul lumber).

New York: Cody *v.* Turn Verein, 48 App. Div. 279, 64 N. Y. Supp. 219, affirmed, 167 N. Y. 607, 60 N. E. 1108 (to excavate land); Jacobs *v.* Mandel, 104 N. Y. Supp. 721 (to furnish labor and materials); New York M. C. Co. *v.* City H. I. Co., 94 App. Div. 439, 88 N. Y. Supp. 233 (to put in metal cornice); Samuels *v.* Fidelity, etc., Co., 49 Hun 122, 1 N. Y. Supp. 850 (to become surety for the plaintiff on a bond; plaintiff recovers increased expense of getting another surety); Eagle Tube Co. *v.* Edward Barr Co., 16 Daly, 212, 10 N. Y. Supp. 113 (to weld tubes in boiler; increased expense of having the work done later by another recoverable).

North Carolina: State *v.* Ingram, 5 Ire. 441 (to keep a bridge in repair).

Ohio: Cincinnati & S. Ry. *v.* Carthage, 36 Oh. St. 631 (to grade streets).

Oregon: Haskins *v.* Scott, 52 Ore. 271, 96 Pac. 1112 (to furnish engine for threshing machine: plaintiff recovers cost of hiring from others).

Pennsylvania: Collins *v.* Baumgardner, 52 Pa. 461 (to carry coal; plaintiff recovers cost of getting coal carried by others, including expense of finding other carriers, less contract price).

price has been paid by the plaintiff, or his part of the contract fully performed, the cost of getting the defendant's work done elsewhere is recoverable.[150] So where a contractor gave a bond

Texas: Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061 (to build courthouse); A. J. Anderson Electric Co. *v.* Cleburne W. I. & L. Co., 23 Tex. Civ. App. 74, 57 S. W. 575 (to erect a building); Osborne *v.* Ayers (Tex. Civ. App.), 32 S. W. 73 (to keep a repair plant for a machine; plaintiff recovers cost of going to a greater distance to get it repaired).

Vermont: Royalton *v.* Royalton & W. T. Co., 14 Vt. 311 (to repair bridge); Forsyth *v.* Mann, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788 (to cut and furnish a granite monument).

Washington: Carroll *v.* Caine, 27 Wash. 402, 67 Pac. 993 (to transport lumber from vessel to plaintiff's yard).

Wisconsin: Eastern Ry. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067 (to handle all the freight at plaintiff's station; plaintiff recovers cost of such handling by others less the contract price).

[150] *Arkansas:* Sullivant *v.* Reardon, 5 Ark. 140, 39 Am. Dec. 368 (to clear land); Neale *v.* Smith, 61 Ark. 564, 33 S. W. 1058 (to teach plaintiff bookkeeping, price being paid in advance; plaintiff recovers cost of the course); Plunkett *v.* Meredith, 72 Ark. 3, 77 S. W. 600 (to dig a well until it would give a certain supply of water).

California: Taylor *v.* North P. C. R. R., 56 Cal. 317 (to build a wagon road in place of one destroyed by railroad and to fence the road).

Connecticut: Hawley *v.* Belden, 1 Conn. 93 (to build a road; it was so defectively built that part of it required to be repaired; cost of repairing recoverable).

Illinois: St. Louis, J. & C. R. R. *v.* Lurton, 72 Ill. 118 (to build a bridge).

Indiana: Howe M. Co. *v.* Reber, 66 Ind. 498 (to keep a sewing machine in repair); Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597 (to clear land).

Iowa: Great W. P. Co. *v.* Tucker, 73 Ia. 755, 34 N. W. 205 (to print posters; plaintiff recovers cost of equivalent advertising).

Maryland: Broumel *v.* Rayner, 68 Md. 47 (to build a street).

Minnesota: Carli *v.* Seymour, 26 Minn. 276, 3 N. W. 348 (to grade a road).

Missouri: Hirt *v.* Hirn, 61 Mo. 496 (to build a house); Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43 (to sink a shaft in mine 500 feet); Wright *v.* Sanderson, 20 Mo. App. 534 (to build foundation of house; improperly built; cost of putting it into proper shape recoverable); Spink *v.* Mueller, 77 Mo. App. 85 (to build a house, finishing woodwork with certain varnish. Defendant used a different and inferior varnish. Plaintiff recovers sum necessarily expended to put on required varnish).

Nebraska: Orr W. Co. *v.* Reno W. Co., 19 Neb. 60 (to repair a ditch).

New York: Mayor of New York *v.* Second Ave. R. R., 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905 (to keep street in repair); Haist *v.* Bell, 24 App. Div. 252, 48 N. Y. Supp. 405 (to build a house and put in pine finish; some finish was put in of hemlock. Plaintiff recovers cost of replacing the hemlock by pine); Morrell *v.* Long Island R. R., 15 Daly, 127, 3 N. Y. Supp. 928 (to fill in depot site on plaintiff's land); May *v.* Georger, 21 Misc. 622, 47 N. Y. Supp. 1052 (to fit for plaintiff a sealskin coat, price paid in advance; plaintiff recovers cost of making it suitable to wear); Whitehouse *v.* Staten I. W. S. Co., 101 App. Div. 112, 91 N. Y. Supp. 544 (to supply water; plaintiff

to the plaintiff for the performance of his contract, and upon breach of contract the plaintiff had the right to complete the work and the plaintiff exercised this right, he was allowed to recover the increased expense of the work, and damages paid for injuries naturally and necessarily incurred by workmen in the course of the work.[151]

The cost of completion is not shown on the ground that this amount has actually been expended by the plaintiff; it is merely the evidence of the value of performance, and one of the factors entering into the profit of the contract. This profit is the same in amount whether the plaintiff actually secures performance of the contract by another or leaves it incomplete. Consequently if the work is left incomplete by the defendant, the plaintiff may under this rule recover the cost of completion, whether he actually has had the work completed or not.[152]

If, however, the completion of the contract is actually secured by the plaintiff, the amount paid by him for such completion is, if reasonable, the best evidence of the value or cost of performance, and it is therefore *prima facie* to be taken as the value of performance; [153] but it is always open to the de-

recovers cost of labor employed in getting a supply elsewhere).

Pennsylvania: Morse *v.* Arnfield, 15 Pa. Super. Ct. 140 (to supply elevator; elevator supply was defective; plaintiff recovers what it would cost to make it conform to specifications).

Vermont: Clifford *v.* Richardson, 18 Vt. 620 (to repair mill); Keyes *v.* Western V. S. Co., 34 Vt. 81 (to repair drain).

Wisconsin: Ashland L. S. & C. Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136 (to construct building. Plaintiff recovers cost of remedying defects in construction); Colburn *v.* Chicago, S. P. M. & O. Ry., 109 Wis. 377, 85 N. W. 354 (to leave plaintiff's land in a smooth condition, contract price paid. Plaintiff recovers cost of putting the land into condition).

England: Fletcher *v.* Gillespie, 3 Bing. 635 (to load vessel); Portman *v.* Middleton, 4 C. B. (N. S.) 322 (to repair a machine).

[151] Newton *v.* Devlin, 134 Mass. 490.

[152] *Connecticut:* Hawley *v.* Belden, 1 Conn. 93, 6 Am. Dec. 206.

Maryland: Davis *v.* Ford, 81 Md. 333, 32 Atl. 280.

Minnesota: King *v.* Nichols, 53 Minn. 453, 55 N. W. 604.

Ohio: Cincinnati & S. Ry. *v.* Carthage, 36 Oh. St. 631.

Texas: Sherman *v.* Connor, 88 Tex. 35, 29 S. W. 1053; Hill *v.* Leigh (Tex. Civ. App.), 100 S. W. 351.

Contra, American Surety Co. *v.* Woods, 105 Fed. 41, 45 C. C. A. 282 (a sporadic case).

[153] *Minnesota:* Anderson *v.* Nordstrom, 60 Minn. 231, 61 N. W. 1132.

New Hampshire: Lamoreaux *v.* Rolfe, 36 N. H. 33.

New York: Mayor of New York *v.* Second Ave. R. R., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

fendant to show that the amount paid was greater than reasonable.[154] And a mere contract for the work with a third party if the work has not in fact been done under the contract, is not evidence at all;[155] still less a bid from a person who did not do the work, higher than the bid of the person who eventually did it.[156]

§ 619. Cost of substituted performance useless to plaintiff.

The cost of substituted performance is only one way of arriving at the value of the contract; and if it appears that the contract is worth less than the cost of performance, the latter cannot be recovered.

Thus where the defendant agreed to take stock in a corporation and give it to the plaintiff and failed to do so, and it then appeared that while to get the stock would require the payment of the par value, the stock when procured would have been worthless, the plaintiff could not recover the par value of the stock, but was restricted to nominal damages.[157] And where a railroad agreed to build its repair shops within the limits of the plaintiff's city, the measure of damages for failure so to do is not the cost of building the shops.[158]

So where defendant agreed to draw out the casing from a well, and failed to do so, the measure of damages is not the cost of drawing out the casing (the well not being benefited thereby) but the (less) value of the casing when drawn out.[159]

In return for the grant of a right of way across plaintiff's land, defendant agreed to grade and curb a street along the location of its track. Neither the railway nor the street was built. In an action for not grading and curbing the railway only nominal damages were given. If the right of way had been used and the railway built, the plaintiff could have recovered the cost of grading and curbing. But here the injury consisted in leaving the land as it was, without *either* railway or street and no damage appears as a result of the injury.[160]

[154] State *v.* Ingram, 5 Ire. (N. C.) 441.

[155] Lamoreaux *v.* Rolfe, 36 N. H. 33.

[156] Gorham Co. *v.* United E. & C. Co. (N. Y.), 95 N. E. 805.

[157] Barnes *v.* Brown, 130 N. Y. 372, 29 N. E. 760.

[158] Missouri, K. & T. Ry. *v.* Fort Scott, 15 Kan. 435.

[159] Elmendorf *v.* Classen, 92 Tex. 472, 49 S. W. 1043.

[160] Hays *v.* Wilkinsburg & E. P. S. Ry., 204 Pa. 488, 54 Atl. 332.

And in general if the thing done is worth less than the cost of doing it, the measure of damages is not the cost but the value of it.[161] So for breach of contract to fill land to a certain grade the measure of damages is not the cost of filling the land to the agreed grade, but the (less) difference in value of the land so filled and the land as it was left.[162]

And so where defendant agreed to sink an oil well on his own land, so that no one else could have been pecuniarily interested in it, the plaintiff cannot recover the cost of sinking the well.[163] He should recover what he can show with reasonable certainty would have come to him from the performance.[164] In a grant of land there was a covenant that a defendant should sink upon the demised premises a pit to the depth of 130 yards in search of coal, and, in case a marketable vein should be reached, pay the plaintiff £2,500. In an action by the plaintiff for breach of this covenant, evidence being given to show that if the defendants had sunk the pit, marketable coal might have been found, it was held that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.[165] If, however, the thing agreed was to build a structure on the plaintiff's land, the mere fact that the

[161] *Michigan:* Archer *v.* Milwaukee, A. E. & S. Co. (Mich.), 129 N. W. 598 (to put a new engine in plaintiff's boat; plaintiff recovers difference between value of boat as it would have been and as it was).

North Carolina: Winston C. M. Co. *v.* Wells-Whitehead T. Co., 144 N. C. 421, 57 S. E. 148 (to exhibit machine at exposition: cost of securing exhibition of it by another, this not having been done, cannot be recovered.

Pennsylvania: Kenderdine Hydro-Carbon Fuel Co. *v.* Plumb, 182 Pa. 463, 38 Atl. 480 (to expend $9,000 in manufacturing a patented article; $3,000 only spent. Measure of damages not the remaining $6,000 where the value of the article would be less).

[162] Bigham *v.* Wabash-Pittsburg T. Ry., 223 Pa. 106, 72 Atl. 318.

[163] Chamberlain *v.* Parker, 45 N. Y. 569.

[164] *Pennsylvania:* Bradford Oil Co. *v.* Blair, 113 Pa. 83, 57 Am. Rep. 442.

England: Pell *v.* Shearman, 10 Ex. 766.

[165] *California:* Taylor *v.* North Pacific Coast R. R., 56 Cal. 317 (to grade a road and build a fence).

Texas: Sherman *v.* Connor, 88 Tex. 35, 29 S. W. 1053 (to build waterworks supplying more water than plaintiff had use for).

See, however, *Kentucky:* Louisville & P. C. Co. *v.* Rowan, 4 Dana, 606, where upon failure by defendant to perform his agreement to excavate a basin on plaintiff's land it was held that evidence to show that the basin would have been useless to the plaintiff is admissible, in mitigation of damages.

plaintiff personally might not have used the structure does not affect the recovery. The cost of building the structure may be recovered at least in the absence of evidence that the structure would not be of such value to anyone.

§ 620. Performance deficient in quantity or quality.

If the work was actually done, but fell short of the agreement in quality, quantity, or circumstances of performance, the measure of damages is the cost of remedying the defect;[166] or if the defect cannot be remedied by a reasonable expenditure, then the difference between the value of the property if the work had been done properly and its value as the work was actually done.[167] So upon the breach of a contract to store

[166] *United States:* Stillwell & B. M. Co. *v.* Phelps, 130 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. 601; North Chicago St. Ry. *v.* Burnham, 42 C. C. A. 584, 102 Fed. 669.

Illinois: Chase *v.* Heaney, 70 Ill. 268.

Louisiana: Leathers *v.* Sweeney, 41 La. Ann. 287, 5 So. 662.

New York: Parmalee *v.* Wilks, 22 Barb. 539.

[167] *Florida:* Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687 (to cultivate fruit trees on land).

Indiana: Sunman *v.* Clark, 120 Ind. 142, 22 N. E. 113 (to saw lumber in certain dimensions. It was sawed in other dimensions. Plaintiff recovers difference between market value as sawed and what the value would have been, sawed as it should); Elwood Planing Mills Co. *v.* Harting, 21 Ind. App. 408, 52 N. W. 621 (to furnish lumber for use in a house. Inferior quality furnished. Measure of damages, difference between actual value of the house as built and as it would have been if built of proper materials).

Iowa: Duggleby Bros. *v.* Lewis Roofing Co., 139 Ia. 432, 116 N. W. 711 (to roof a building).

Massachusetts: Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342 (to furnish a supply of water to the town; less than agreed amount furnished; plaintiff recovers difference in value between the supply actually furnished and that agreed to be furnished).

Michigan: White *v.* Brockway, 40 Mich. 209 (to put in steam boiler; not up to specifications; recover difference in value); Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674 (to supply saw-mill to cut a certain amount per day; it cut less; difference in value of mill to be supplied and that actually supplied may be recovered).

Minnesota: Whalon *v.* Aldrich, 8 Minn. 346 (to drive and deliver logs during a certain year; part were not delivered until next year; plaintiff recovers difference in value of logs in first and second year).

New York: Barretts P. & H. D. E. Co. *v.* Wharton, 101 N. Y. 631, 4 N. E. 344 (to dye bunting; unskilfully done; difference in value recoverable); Emmerich *v.* Chegnay, 46 Misc. 456, 92 N. Y. Supp. 336 (to dye ribbons; unskilfully done; difference in value recoverable).

Oregon: Chamberlain *v.* Hibbard, 26 Ore. 428, 38 Pac. 437 (to plaster building; quality of plastering poor; difference in value of plaster which was and of plaster which should have been put on recoverable.)

Texas: Hardin *v.* Newell (Tex. Civ.

fruit at a certain temperature, the measure of damages is the diminution in value of the fruit.[168] And the value that would have been added to a slave, by a trade which he was apprenticed to learn, is the measure of damages for a breach of the covenant to teach him properly.[169] So where the plaintiff, a water company, furnished hydrants to the defendant town, and agreed to furnish a certain amount of water, and the supply fell short, in an action for the agreed price, the town was allowed to recoup the difference between the value of the water which should have been furnished and of that actually furnished.[170] The defendant agreed to furnish to the plaintiff, the publisher of a country newspaper, "patent outsides," containing no more than three columns of advertisements. The "outsides" furnished did, in fact, contain more than three columns, and the plaintiff claimed compensation for the excess at his own advertising rates. It was held, however, that the measure of damages was the difference between the value of "outsides" with three columns of advertising and the value of those furnished.[171]

Upon this general principle where the contract secures some act for the benefit of land, the measure of damages is the difference between the value of the land without the act done and its value if the act had been done.[172] Upon a similar principle

App.), 40 S. W. 331 (to pasture cattle; water and pasturage furnished insufficient; plaintiff recovers diminution in value of cattle).

Utah: Farr *v.* Griffith, 9 Utah, 416, 35 Pac. 506 (to keep ice-pond flooded so as to make ice; on breach plaintiff recovers value of the ice which would have been made).

Vermont: Laurent *v.* Vaughn, 30 Vt. 90, 72 Am. Dec. 288 (to carry peas to New York; by defendant's improper delay they were frozen in the lake at Burlington. Owner, acting reasonably, took the peas and sent them to Boston and there sold them. Measure of damages is difference between net value of peas in New York and amount realized in Boston).

Wisconsin: Ashland Lime, Salt & Cement Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136 (to construct a building; not properly done. Plaintiff recovers diminished value of building on account of defects not remediable); Noble *v.* Libby, 144 Wis. 632, 129 N. W. 791 (to locate certain land; inferior land located; plaintiff recovers difference in value of the land).

[168] Hyde *v.* Mechanical Refr. Co., 144 Mass. 432, 11 N. E. 673. So of contract to keep chickens frozen: Beeman *v.* Banta, 118 N. Y. 538, 23 N. E. 837, 16 Am. St. Rep. 779.

[169] Bell *v.* Walker, 5 Jones' (N. C.) L. 43.

[170] Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311.

[171] Baltzell *v.* Moritz, 85 Ala. 123, 4 So. 835.

[172] *To build a station on or near the land:*

in Mine Hill & S. H. Railroad *v.* Lippincott,[173] a railroad company agreed on notice to remove its road from over certain coal beds, so as to allow them to be mined. The measure of damages for a breach was held to be the value of the coal in the mine.

§ 621. Contracts in which no contract price is fixed.

When the contract is for the exchange of labor or of property, or of one for the other, the profit of the contract is found by

Alabama: Mobile & M. Ry. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Indiana: Louisville, N. A. & C. Ry. *v.* Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404.

Kentucky: Louisville A. & P. E. Ry. *v.* Whipple, 25 Ky. L. Rep. 2312, 80 S. W. 507 (overruling Louisville & N. R. R. *v.* Neafus, 93 Ky. 53, 18 S. W. 1030).

Pennsylvania: Watterson *v.* Allegheny Valley R. R., 74 Pa. 208.

Texas: Houston & T. C. Ry. *v.* Malloy, 64 Tex. 607.

England: Wilson *v.* Northampton, etc., Ry., L. R. 9 Ch. 279.

See *post*, § 630.

To build and maintain railroad crossings on plaintiff's land:

Martin *v.* Monongahela R. R., 48 W. Va. 54, 37 S. E. 563.

To build and operate a railroad through the land:

California: Smith *v.* Los Angeles & P. Ry., 98 Cal. 210, 33 Pac. 53.

District of Columbia: Eckington & S. H. Ry. *v.* McDevitt, 18 D. C. App. Cas. 497.

Oregon: Blagen *v.* Thompson, 23 Ore. 239, 31 Pac. 647, 18 L. R. A. 315 (where plaintiff did not own the land, but had a contract for its purchase, the measure of damages is the difference between the contract price and its value if the road had been built; the defendant having had notice of the contract).

South Carolina: Lipscomb *v.* South Bound R. R., 65 S. C. 148, 43 S. E. 388 (loss of rental value for delay).

To build and maintain a side track on or connected with the land. Amsden *v.* Dubuque & S. C. R. R., 28 Iowa, 542.

To supply water to irrigate the land. Pallett *v.* Murphy, 131 Cal. 192, 63 Pac. 366, 82 Am. St. Rep. 341 (difference in rental value, since the supply is an annual one).

To establish business on the land. Ironton Land Co. *v.* Butchart, 73 Minn. 39, 75 N. W. 749 (contract by an owner of 165 acres of land with the defendant that defendant should erect and operate a steel plant of certain capacity. Measure of damages for breach of agreement is difference between value of land with and without the plant. If agreement was partly performed then measure of damages is difference between value of land as it would have been if the contract had been wholly performed and as it actually was with the partial performance).

To plant vines on the land. Waldteufel *v.* Pacific Vineyard Co., 5 Cal. App. 465, 92 Pac. 747 (inferior vines planted; plaintiff recovers difference in value of land at time of discovery of the inferiority).

To put street and sidewalks adjacent to land in good condition. King *v.* Hudson R. R. R., 141 App. Div. 346, 126 N. Y. Supp. 536.

To maintain dams in connection with mill. Hurxthal *v.* St. Lawrence, B. & M. Co., 65 W. Va. 346, 64 S. E. 355.

[173] 86 Pa. 468.

subtracting the cost or value of the plaintiff's performance from the value of the defendant's performance.

So if the defendant agreed to do some act for the plaintiff and the plaintiff on his side was to do some act for the defendant, then the profit of the contract is measured by subtracting the cost of the plaintiff's act from the value of the defendant's act.[174]

So where the plaintiff agreed to convey a house and lot to defendant on defendant's promise to erect a house for plaintiff; the profit is found by subtracting the value of the house to be conveyed from the value of the house to be built.[175] And where the parties exchanged land and defendant agreed to erect a building on the property conveyed by him, the plaintiff upon breach of the contract may recover the value of such building.[176] Where a creditor of a corporation accepted bonds in payment of his debt, on the agreement that $50,000 should be invested in additions to the plant, the measure of damages for failures to invest the amount is the additional value which would have been given to the bonds by the investment.[177]

II.—Rules of Damages in Particular Cases

§ 622. Agreements to loan money.

Having now stated the general rules applicable in actions of contract, we proceed to give some instances of their application in special classes of cases; and first, an agreement to loan money.

Upon breach of a contract to loan money, if no special damage is shown, the recovery is only nominal.[178] For though by

[174] So where the defendant employed plaintiff to build an extension to a water tower and agreed to keep the water inside the tower at such a height as the plaintiff might need to support his workmen, but the water was not furnished and the plaintiff was obliged to place a scaffolding outside the tower for his workmen to stand on, it was held that the measure of damages was not the entire cost of the scaffolding, but only the amount by which the cost was increased by the breach; and what it would have cost him to build a float on the water inside the tower must be deducted. Mason Manuf. Co. *v.* Stephens, 127 N. Y. 602, 28 N. E. 411.

[175] Laraway *v.* Perkins, 10 N. Y. 371.

[176] Braddy *v.* Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121.

[177] South Texas Tel. Co. *v.* Huntington (Tex.), 138 S. W. 381.

[178] *Indiana:* Turpie *v.* Lowe, 114 Ind. 37, 15 N. E. 834; Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 5 Am. St. Rep. 578.

New York: Bradford E. & C. R. R. *v.* New York, L. E. & W. R. R., 123 N. Y. 316, 25 N. E. 499, 20 Am. St. Rep. 748.

See § 829.

the contract the plaintiff would receive the amount of the loan, it would be saddled with an obligation of exactly equal amount, so that the profit of the contract would be nothing. It is clear, however, that a contract to loan money at less than the current rate of interest would give the right to substantial damages, equal to the difference between the current rate and the agreed rate.[179]

If the borrower could get the money elsewhere, no consequential damages can be recovered for breach of the agreement,[180] except the actual cost of obtaining another loan, which may be recovered.[181] And of course no consequential damages can be recovered unless the lender had notice of the purpose of the loan.[182] But if the money could not be obtained elsewhere, and the lender had notice of the purpose of the loan, he must make compensation for the failure of that purpose by reason of his breach of contract.[183] Thus if the defendant

[179] New York Life Co. *v.* Pope, 24 Ky. L. Rep. 485, 68 S. W. 851.

[180] *Alabama:* Gooden *v.* Moses, 99 Ala. 230, 13 So. 765.

Texas: Equitable Mortgage Co. *v.* Thorn (Tex. Civ. App.), 26 S. W. 276.

[181] Bohemian-American W. G. Assoc. *v.* Northern Bank, 120 N. Y. Supp. 134.

[182] *California:* Savings Bank of Southern California *v.* Asbury, 117 Cal. 96, 48 Pac. 1081.

Texas: Equitable Mortgage Co. *v.* Thorn (Tex. Civ. App.), 26 S. W. 276.

Where defendant, sued as guarantor of the debt of a third party, desired to offset damages for plaintiff's breach of agreement to extend the debtor further credit, it was held that damages to the defendant because the debtor, lacking the credit, was closed out of business and rendered unable to pay a debt to defendant were "too remote, speculative and contingent." Leftovits *v.* First Nat. Bank, 152 Ala. 521, 44 So. 613.

[183] *Alabama:* Bixby-Theison Lumber Co. *v.* Evans, 167 Ala. 431, 52 So. 843 (contract to loan money to build concrete dam to run a saw-mill. Breach after part of dam built. Plaintiff entitled to such damages as would replace him in *statu quo;* but profits expected from the operation of the mill could not be recovered as they were speculative).

New York: Treanor *v.* New York Breweries Co., 51 Misc. 607, 101 N. Y. Supp. 189 (contract to loan money to set up plaintiff in saloon business. Plaintiff hired premises, and paid for good will of business and two months' rent; after breach, paid a bonus for release from terms of lease. On defendant failing to furnish money, plaintiff allowed to recover cost of good will and bonus paid for release, but not the rent paid, in absence of evidence that the rental value of premises was not equal to rent); Pardee *v.* Douglas, 122 App. Div. 395, 106 N. Y. Supp. 775 (plaintiff having a contract with S. to bore an oil well, in order to get funds to pay for boring the well, entered into a contract with the defendant whereby the latter agreed to furnish the money and pay it to the said S. as their payments came due for the work, and the plaintiff agreed to deposit certificates

agreed to advance money to buy certain land, and by reason of the breach the borrower, not being able to get the money elsewhere, lost the value of his purchase, the borrower must pay the value of the bargain lost.[184] So where the defendant agreed to advance the money to take up a mortgage, and because of his default the mortgage was foreclosed and the borrower lost his equity of redemption he may recover the value of the equity.[185] And upon breach of an agreement to loan money for the express purpose of discharging debts by means of a composition with creditors, the measure of damages is the difference between the amount of the debts and the amount for which they could have been discharged in composition.[186]

Where the defendant agreed to advance money in order to enable the plaintiff to get out and market certain logs the measure of damages for failure to advance the money (which the plaintiff could not obtain elsewhere) was the difference between the value of the logs that could have been marketed with the money and the value of the smaller number of logs actually marketed, less the cost of getting out and marketing the additional logs.[187]

for 100,000 shares of its stock with a specified bank to be transferred from time to time by said bank to the defendant at the rate of $5 a share in payment of the money they should pay to S. Defendant failed to pay the money. The measure of damages was the excess of the cost of boring the well agreed upon over the value of the 100,000 shares of stock).

[184] *New York:* Goldsmith *v.* Holland Trust Co., 5 App. Div. 104, 38 N. Y. Supp. 1032.

Texas: Equitable Mortgage Co. *v.* Thorn (Tex. Civ. App.), 26 S. W. 276 (*semble*).

[185] Doushkess *v.* Burger Brewing Co., 20 App. Div. 375, 47 N. Y. Supp. 312.

[186] Banewur *v.* Levenson, 171 Mass. 1, 50 N. E. 10. In this case Field, C. J., dissenting, said: "For a breach of promise to lend or advance money when the plaintiffs have parted with nothing as the consideration for the promise, but only have made certain promises in return, the damages often are merely nominal. The reasonable cost of procuring another similar loan, or, where another loan has not been obtained, the value of the contract to the plaintiffs, or what it would have cost to procure a similar one on the same terms, usually has been allowed as damages. This, I think, is the correct rule. See Greene *v.* Goddard, 9 Met. (Mass.) 212, 232, 233; Prehn *v.* Bank, L. R. 5 Exch. 92; Property Co. *v.* West, [1892] 1 Ch. 271, 277; South African Territories *v.* Wallington, [1897] 1 Q. B. 692; Dodd *v.* Jones, 137 Mass. 322; 2 Sedg. Meas. Dam. (5th ed.) 622. Under this rule, I think, it is obvious that the damages never can be more than the amount agreed to be lent, with interest, and usually would be much less."

[187] Graham *v.* McCoy, 17 Wash. 63, 48 Pac. 780.

In the case of Duckworth *v.* Ewart,[188] Messrs. Ratledge, the owners of building land on which they were erecting houses, having become unable to proceed with the building, and having mortgaged it to a building society for £4,300, and in lesser amounts to three mortgagees, of whom the plaintiff was one, entered into an indenture with the plaintiff and the other mortgagees and other creditors, in which it was agreed that the plaintiff should have power to sell the land, subject to the mortgage to the building society, and out of the proceeds pay the expenses of the trust and the other mortgages, and the surplus to the owners. It also empowered the plaintiff to enter on the land and finish the buildings, and also to raise any sum not exceeding £5,000 for carrying into effect the trust of the indenture by a mortgage on the premises, which should have priority over all the other mortgages except that to the building society. In the same instrument the defendant covenanted to execute all assurances for enabling the plaintiff to execute the trusts of the deed. The plaintiff entered on the execution of the trusts and incurred an expense of £1,100 on the land. He also arranged with the building society to accept £4,100 in satisfaction of their debt, and contracted with certain persons for a loan of £5,000 on the land, by a mortgage which was prepared, and was agreed to by all parties. At the last moment, when the parties had met to close the transaction, the defendant refused to execute the mortgage; whereupon the building society, acting on a power of sale contained in their mortgage, foreclosed it, and sold the property at a forced sale, for £4,510, which was exhausted in paying their debt and expenses. Martin, B., was of the opinion that, in addition to the costs of the proposed mortgage, the defendant was liable for the difference between £5,000 and the value of the land as building land, such as it was contemplated as being by the indenture, or at all events that plaintiff was entitled to £900, the residue of £5,000, after paying £4,100, agreed to be taken for the first mortgage. But the majority of the court per Pollock, C. B., and Bramwell, B.,

But see Bixby-Theison L. Co. *v.* Evans, 167 Ala. 431, 52 So. 84, where upon breach of contract to loan money to build a dam to create power for a mill no recovery was allowed for loss of profits of the mill.

[188] 2 H. & C. 129, 33 L. J. N. S. Ex. 24.

held that the plaintiff was entitled to recover only the costs of the abortive mortgage.

§ 622a. For settlement or security of a debt.

For breach by the creditor of a contract that the debtor should be allowed to work out the debt by services, or by sale of goods, the measure of damages is the profit which would have been made by performing services or selling goods the value of which would amount to the debt. So for breach of a contract to allow plaintiff to work out his debt by grinding corn at eight cents per bushel the measure of damages was the profit that would have been made by grinding corn enough to pay the debt at the agreed price.[189]

Where such a contract for the settlement of a debt is broken by the debtor, the measure of damages is the amount of the debt.[190] The measure of damages for breach of contract to give a mortgage or other security for a debt is *prima facie* the amount of the debt still unpaid.[191]

§ 622b. To pay money.

For breach of a contract to pay money, the measure of damages is the amount of money to be paid, with interest.[192] And where a debtor, being unable to pay in cash, gave interest-bearing certificates of indebtedness, which could be sold only at a discount, the creditor could not claim from the debtor to be reimbursed for the discount.[193]

[189] Oldham *v.* Kerchner, 79 N. C. 106, 28 Am. Rep. 302.

In Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254, the court appears to have allowed the whole amount of the debt as damages in such a case; but clearly the cost of performance by the debtor should have been subtracted from the amount of the debt.

[190] Vallens *v.* Tillman, 103 Cal. 187, 37 Pac. 213.

[191] *Minnesota:* Dye *v.* Forbes, 34 Minn. 13.

New York: Schmaltz *v.* Weed, 27 App. Div. 309, 50 N. Y. Supp. 168.

So for breach of contract to give a mortgage to secure a loan from a third party to the plaintiff, the damages are *prima facie* the amount of the loan. Rider *v.* Pond, 19 N. Y. 262.

[192] *Connecticut:* Tyler *v.* Marsh, 1 Day, 1.

Kentucky: Federal Lumber Co. *v.* Reece, 116 S. W. 783.

Texas: Close *v.* Fields, 13 Tex. 623.

Virginia: Bethel *v.* Salem Imp. Co., 93 Va. 354, 25 S. E. 304, 57 Am. St. Rep. 803, 33 L. R. A. 602.

Washington: Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

[193] Looney *v.* District of Columbia, 113 U. S. 258, 5 Sup. Ct. 463, 28 L. ed. 974; Board of Directors *v.* Roach, 174 Fed. 949, 99 C. C. A. 453.

§ 622c. To make a contract.

A contract to enter into a contract subjects the defendant upon breach to the same damages as if he had made and broken the second contract.[194] Thus for breach of a contract to give a promissory note the measure of damages is the amount of the note.[195] If plaintiff is obliged to go to expense in order to procure another to enter into the contract, he may recover the expense. So where defendant agreed to become surety on plaintiff's bond the latter, upon breach, may recover the expense of supplying a new bond.[196]

§ 623. To insure, or to assign a policy of insurance.

For breach of a contract to insure a house the plaintiff, if the house is burnt without his knowledge of the breach, is entitled to recover the amount which would have been recovered on the policy, that is, in general, the amount of the policy (not exceeding however, the amount of the loss), less the premiums.[197] The same rule applies in the case of a contract to insure goods against fire.[198] In the case of a valued policy, the measure of damages is the face of the policy less the premiums; as in case of a contract to insure a vessel.[199] And so for breach of an agreement to keep alive a policy of life insurance the measure of damages is the face of the policy, less the premiums.[200] If the insurance company in which the defendant

[194] Pratt *v.* Hudson R. R. R., 21 N. Y. 305.

[195] *Minnesota:* American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243; Deering *v.* Johnson, 86 Minn. 172, 90 N. W. 363.

New York: Hanna *v.* Mills, 21 Wend. 90.

North Dakota: Kelly *v.* Pierce, 16 N. D. 234, 112 N. W. 995.

Ohio: Stephenson *v.* Repp, 47 Oh. St. 551, 25 N. E. 803, 10 L. R. A. 620.

Texas: Young *v.* Dalton, 83 Tex. 497, 18 S. W. 819.

England: Robinson *v.* Robinson, 29 Eng. L. & Eq. 212.

[196] Samuels *v.* Fidelity & C. Co., 49 Hun, 122, 1 N. Y. Supp. 850.

[197] *United States:* DeTaslet *v.* Crousellat, 1 Wash. C. C. 504, Fed. Cas. No. 3827; Morris *v.* Summerl, 2 Wash. C. C. 203, Fed. Cas. No. 9837.

New Jersey: Lehneis *v.* Egg Harbor Commercial Bank, 26 Atl. 797.

Wisconsin: Campbell *v.* American F. I. Co., 73 Wis. 100, 40 N. W. 661; Franck *v.* Stout, 139 Wis. 223, 120 N. W. 867.

Canada: Douglass *v.* Murphy, 16 U. C. Q. B. 113.

[198] *New Hampshire:* Ela *v.* French, 11 N. H. 356.

England: Ex parte Bateman, 8 D. M. & G. 263, 268; Smith *v.* Price, 2 F. & F. 748.

[199] Miner *v.* Tagert, 3 Binn. (Pa.) 205.

[200] *Missouri:* Scheele *v.* Lafayette Bank, 120 Mo. App. 611, 97 S. W. 621.

should have taken out or kept alive a policy was insolvent at the time when the loss should have been paid, the measure of damages is the amount which could have been realized from the policy.[201] So where a defendant had agreed to procure insurance for the plaintiff, but before the insurance was effected, the property was destroyed in the Chicago fire of 1872, it was held that the defendant was not liable for the face value of the policy, that he was only liable for the amount of dividends which the company would have declared on a policy of that face value.[202]

If, however, the plaintiff was informed of the breach a sufficient time before the loss to place the insurance himself, he cannot recover the amount which would have been recoverable on the policy; for by the rule of avoidable consequences he should have insured himself. The measure of damages is the value of the policy at the time the failure to insure or the lapse is discovered; which would be the cost of a policy.[203] In an English case the defendant assigned a policy of insurance for £1,000, on which he was to pay the premiums, to trustees for his creditors by a deed containing a covenant that he would do nothing to avoid the policy, which was subject to a condition that if the assured should go beyond the limits of Europe, it should be void. He violated this covenant, thereby avoiding the policy. It was held that the measure of damages was the value of the policy at the time of the judgment, taking into consideration the fact that the defendant had covenanted to pay and should pay the premiums thereon.[204]

The same principle applies to an agreement to assign a policy.

New York: Toplitz *v.* Baur, 161 N. Y. 325, 55 N. E. 1059; Gray *v.* Murray, 3 Johns. Ch. 167; Soule *v.* Union Bank, 45 Barb. 111, 30 How. Pr. 105; Bailey *v.* American D. & L. Co., 52 App. Div. 402, 65 N. Y. Supp. 330.

[201] Sawyer *v.* Mayhew, 51 Me. 398.

[202] Chicago Building Society *v.* Crowell, 65 Ill. 453.

[203] *Illinois:* Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

Kentucky: Vaughan *v.* Reddick, 32 Ky. L. Rep. 531, 106 S. W. 292.

Maine: Grindle *v.* Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31.

New York: Ainsworth *v.* Backus, 5 Hun, 414 (but see Douglass *v.* Murphy, 16 Up. Can. Q. B. 113, where the contrary seems to be assumed).

On this ground must be explained: National Mahaiwe Bank *v.* Hand, 80 Hun, 584, 30 N. Y. Supp. 508, 1133, 89 Hun, 329, 35 N. Y. Supp. 449.

[204] Hawkins *v.* Coulthurst, 5 B. & S. 343.

So where the defendant sold the plaintiff a house, and agreed to assign the policy of insurance upon it, the measure of damages upon a breach of the agreement is the cost of insurance for the unexpired term of the policy; in other words, the value of the policy. If the house is burned without insurance, the plaintiff can recover nothing for loss of the insurance money, for he should have insured himself; but is restricted in his recovery to the actual value of the policy at the time of breach.[205]

Where defendant agreed with an agent to take from him an insurance policy to take effect several months later, and then refused to take the policy it was held that the agent could not recover the entire amount of his commissions on the supposition that the policy would take effect at the later date and would continue in effect throughout the term.[206]

§ 624. To work a farm on shares.

In an action for breach of a contract by which the defendant agrees to cultivate a farm on shares, the measure of damages is the profit which the plaintiff would have made if the contract had been fulfilled.[207] Where such an agreement was broken by the owner of the farm, the fact that the plaintiff got another farm to work was held immaterial.[208] The value of the probable crop has been held not too uncertain to form the basis of recovery between the parties; and the due proportion of the probable net profit from cultivation may be recovered,[209] whether the breach was by the owner [210] or by the laborer.[211]

[205] *Massachusetts:* Dodd *v.* Jones, 137 Mass. 322.

New York: Elfenbeim *v.* Abbondanza, 64 Misc. 176, 118 N. Y. Supp. 1073.

[206] Weingrad *v.* Kletzky, 52 Misc. 129, 101 N. Y. Supp. 588.

[207] *California:* Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62.

Michigan: McClure *v.* Thorpe, 68 Mich. 33.

Missouri: Smock *v.* Smock, 37 Mo. App. 56.

New York: Ecker *v.* Cottrell, 24 App. Div. 496, 48 N. Y. Supp. 1031.

Pennsylvania: Hoy *v.* Grenoble, 34 Pa. 9, 75 Am. Dec. 628.

[208] *New York:* Taylor *v.* Bradley, 4 Abb. App. 363, 100 Am. Dec. 415.

Pennsylvania: Wolf *v.* Studebaker, 65 Pa. 459.

[209] In New York the rule appears to be, to estimate the value of the chance at the time the contract was made, by estimating the probable profits and the probable cost: Taylor *v.* Bradley, 39 N. Y. 129; Ecker *v.* Cottrell, 24 App. Div. 496, 48 N. Y. Supp. 1031.

[210] Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62.

[211] Zachary *v.* Swanger, 1 Ore. 92.

§ 625. To share the profits of a business.

For breach of a contract to share the profits of a business the measure of damages is the amount of profits, if this can be ascertained with sufficient certainty since that is the amount which the plaintiff would have realized by performance.[212] So where the defendant agreed to supply steers for plaintiff to fatten for market, profits to be divided, the measure of damages is the probable profits.[213] In estimating future profits there is of course an element of uncertainty, but the jury must do its best to estimate them. If the business has been disposed of by the defendant to a third party, profits realized by him may be shown.[214]

§ 626. For forbearance.

* Contracts for forbearance are often entered into by creditors for certain considerations, on which they forbear to pursue their debtor during a given time. In a case of this kind, where the plaintiff had recovered judgment against his debtor, the defendant, in consideration that the plaintiff would forbear to sue out execution for a certain time, agreed to erect a house and lease it to the plaintiff; such erection and lease to be in full satisfaction of the judgment. The agreement not being performed, it was held that the value of the house was the measure of damages, and not the difference between the amount of the judgment and value of the house.[215] ** For breach of a contract to forbear committed by the creditor damages are nominal merely, where a case for consequential damages is not

[212] *Colorado:* Beckwith *v.* Talbot, 2 Colo. 639 (to sell cattle on joint account); Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018 (to engage in mercantile business as partners).

Iowa: Dockstader *v.* Young M. C. Assoc., 109 N. W. 906 (to fit up athletic ground, to be paid out of revenue).

New York: Crittenden *v.* Johnston, 7 App. Div. 258, 40 N. Y. Supp. 87 (to manage a hotel on shares).

Pennsylvania: Kenderdine H. C. F. Co. *v.* Plumb, 182 Pa. 463, 38 Atl. 480 (to manufacture goods, plaintiff to have half the profits of sale).

Texas: Gordon *v.* Sanborn (Tex. Civ. App.), 35 S. W. 291 (to buy in land on foreclosure and sell for benefit of mortgagee).

Washington: Belch *v.* Big Store Co., 46 Wash. 1, 89 Pac. 174 (to conduct plumbing business for half profits).

[213] Rule *v.* McGregor, 117 Ia. 419, 90 N. W. 811.

[214] Treat *v.* Hiles, 81 Wis. 280, 50 N. W. 896.

[215] Strutt *v.* Farlar, 16 M. & W. 249. See Ellison *v.* Dove, 8 Blatchf. 571.

made out,[216] and the creditor can recover only the amount forborne, with interest and costs to the sale. Damages sustained by a forced sale of the property levied on are too remote.[217] The plaintiff cannot recover compensation for the expense of raising money to pay the debt.[218]

Where, however, consequential damages are within the contemplation of the parties they may be recovered. So, if the contract includes an agreement to vacate an attachment, and upon breach of this agreement the property is sold at judicial sale, the measure of damages is the true value of the property less the amount realized on the sale.[219] And where the defendant had the plaintiff arrested, the latter may also recover the expense of obtaining a discharge.[220]

§ 627. Actions against stockholders.

* The measure of damages in actions brought by incorporated companies against stockholders, upon calls made for payment of stock, furnishes us with another subject of inquiry. Where the defendant subscribed for stock which had been forfeited by the company, it has been held in New York that the forfeiture was not a bar to the action, but that the nominal value of the stock forfeited, less the actual cash value at the time it was declared forfeited, was the measure of compensation.[221] And unless the value of the stock reaches the whole debt and interest,[222] the plaintiff must have judgment for the balance.[223] ** Where, in such actions, all the money subscribed is necessary for the purpose intended, the recovery is of course measured and limited by the amount subscribed; but if an amount less than the amount subscribed is all that is in fact required, it is held, in Illinois, that the recovery should be *pro rata*.[224] A promise to subscribe for a certain amount of stock in a plank-road company, to induce the selection of a particular

[216] Reid *v.* Johnson, 132 Ind. 416, 31 N. E. 1107.

[217] Indiana & I. C. Ry. *v.* Scearce, 23 Ind. 223.

[218] Deyo *v.* Waggoner, 19 Johns. (N. Y.) 241.

[219] Cole *v.* Stearns, 23 App. Div. 446, 48 N. Y. Supp. 318.

[220] Smith *v.* Way, 6 All. (Mass.) 212.

[221] Herkimer Man. & H. Co. *v.* Small, 21 Wend. 273.

[222] s. c. 2 Hill, 127.

[223] Johnson *v.* Stear, 15 C. B. (N. S.) 330.

[224] Miller *v.* Ballard, 46 Ill. 377.

route, if accepted, is valid, and may be enforced. The measure of damages is the difference between the value of the stock at the time of the trial, and the amount agreed to be paid for it.[225] On the other hand, on a breach of an agreement to give land for stock, if a specific performance cannot be decreed, in estimating the damages, reference should be had not to the nominal value of the stock, but to the land which ought to have been conveyed.[226]

§ 627a. To buy, sell or transfer stock.

For breach of an agreement to buy stock, the seller may recover the difference between the contract price and the market value of the stock;[227] or, if he is able to secure a transfer to the purchaser on the books of the company the entire contract price.[228] He is also entitled to recover back assessments levied on him after the date at which the defendant agreed to buy the stock.[229] Where one sells stock to plaintiff with an agreement to buy it back after a certain time or to secure a purchaser for it at a certain price, and fails to keep his contract, the measure of damages, upon tender of the stock, has been held to be the agreed price,[230] together with a subsequent assessment on the stock which the plaintiff was obliged to pay.[231] The damages cannot be reduced by showing that plaintiff might have sold the shares during the period at the agreed price, since he might keep them during that period if he desired;[232] but after breach he should take reasonable means by sale of the stock to reduce the damages.[233] In an action against a corporation for failure to transfer stock on its books

[225] Rhey *v.* Ebensburg & S. P. R. Co., 27 Pa. 261.

[226] Dayton & C. R. R. Co. *v.* Hatch, 1 Disney (Oh.), 84.

[227] Herd *v.* Thompson, 149 Pa. 434, 24 Atl. 282.

[228] Orr *v.* Bigelow, 20 Barb. (N. Y.) 21.

[229] *California:* Gay *v.* Dare, 103 Cal. 454, 37 Pac. 466.

New York: Orr *v.* Bigelow, 20 Barb. (N. Y.) 21.

[230] Campbell *v.* Woods, 122 Mo. App. 719, 99 S. W. 468. The reason given was that any other rule would defeat the object of the contract. This hardly seems sufficient, since a breach necessarily defeats the object of the contract, and the allowance of damages is not to secure the object of the contract but to give compensation for the defeat of such object.

[231] Gay *v.* Dare, 103 Cal. 454, 37 Pac. 466.

[232] Aken *v.* Clark, 146 Ia. 436, 123 N. W. 379.

[233] Davidor *v.* Bradford, 129 Wis. 524, 109 N. W. 576.

to the plaintiff, the measure of damages is the value of the stock; the plaintiff losing his ownership in the stock by the act of the company.[234] And where a corporation failed to give a stockholder an opportunity to subscribe to new stock at a certain price, which he had a right to do, the measure of damages is the difference between the actual value of the stock and the price at which he had the right to subscribe for it.[235]

In an action for breach of a contract to pay plaintiff for his services by a certain amount of preferred stock in a corporation, it appeared that the corporation never issued such stock; the plaintiff was nevertheless allowed to recover its estimated value, if issued.[236]

§ 628. By assignees of bankrupts.

* Interesting questions are often presented in suits by assignees seeking to enforce contracts made by the bankrupt. In a case in assumpsit in the English Exchequer, the facts were that the bankrupt had, previous to his bankruptcy, delivered to the defendant a bill of exchange for £600, which he promised to discount, retaining £100 and the discount. He kept the bill, however, and paid nothing to the bankrupt. On this state of facts, the judge who tried the cause told the jury that they were bound to give the £600, less the £100 and the discount. An effort was made to set the verdict aside, on the ground that the cause should have been left to the jury

[234] *United States:* Tayloe *v.* Turner, 23 Fed. Cas. No. 13,770, 2 Cranch C. C. 203; Crosby Lumber Co. *v.* Smith, 51 Fed. 63.

New York: Commercial Bank *v.* Kortwright, 22 Wend. 348 (affirming Kortwright *v.* Commercial Bank, 20 Wend. 91) (highest value between refusal and suit).

Pennsylvania: German U. B. & S. F. Assoc. *v.* Sendmeyer, 50 Pa. 67 (value at time of refusal).

So where a corporation issued bonds with the agreement that at maturity they might be converted into preferred stock, and at maturity it failed on demand to deliver the stock, the measure of damages is the value of the stock at the time of the demand. Bratten *v.* Catawissa R. R., 211 Pa. 21, 60 Atl. 319.

In one case where the refusal was by a building society, the plaintiff was allowed to recover the amount paid on the stock from time to time, as dues, with interest from the times of payment. North America Bldg. Assoc. *v.* Sutton, 35 Pa. 463, 78 Am. Dec. 349.

[235] Stokes *v.* Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969.

[236] Crichfield *v.* Julia, 147 Fed. 65, 77 C. C. A. 297.

at large, and that the judge erred in telling them, as *a point of law*, that the sum above stated was the measure of damages. But the charge was held right, and the court said: "No doubt all questions of damage are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." [237] **

§ 629. Agreements for arbitration and award.

Where the defendant broke his contract to submit a dispute to arbitrators, it was held that the plaintiff could recover substantial damages, although it was found that he had no valid claim. The damages would include "expenses to which he had been subjected by reason of his necessary preparation for a trial before the arbitrators, on account of his own loss of time and trouble, and in employing counsel, taking depositions, payments to witnesses and arbitrators," and other expenditures; but he could only recover these so far as they were not available for the trial of his cause before the court, for he had to repair to the latter, and the only result of the defendant's act was to make him incur the extra expenses. It was said that the counsel fees were recoverable, for they were suitable and properly incurred, and the plaintiff was deprived of their benefit by the wrongful act of the defendant.[238] If, however, no extra expenses were incurred by reason of the agreement, nominal damages only may be recovered.[239]

§ 630. To construct stations, etc.

Where a railroad company breaks an agreement to build a

[237] Alder *v.* Keighley, 15 M. & W. 117. The equitable assignee in this class of cases has no greater right than the plaintiffs in the record. Griffiths *v.* Perry, 1 E. & E. 680. But his right is equal to theirs: Ashdown *v.* Ingamells, 5 Ex. Div. 280.

[238] *Georgia:* McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34.

Maine: Call *v.* Hagar, 69 Me. 521.

Massachusetts: Pond *v.* Harris, 113 Mass. 114; New Haven & N. Co. *v.* Hayden, 117 Mass. 433.

Ante, § 607.

[239] Munson *v.* Straits of Dover S. S. Co., 43 C. C. A. 57, 102 Fed. 926.

station at any given place, the measure of damages is the enhanced value of the land had the depot been erected.[240] In Missouri, Kansas & Texas Railway *v.* Fort Scott [241] the company broke its contracts to extend its line to Fort Scott. It was held that plaintiff could recover either the value of the improvements for purposes of taxation, or, as the contract was entire, the whole consideration paid in advance; but evidence to show a decline in population and depreciation in real estate was inadmissible as being too speculative. Where a subscription was made to the stock of a railway company on the condition that the railway should pass by a certain place, which condition the company failed to comply with, but before their failure the subscriber had paid his subscription by a transfer of land to the company: in an action by the subscriber against the company for breach of the agreement, the measure of damages was held the value of the land at the time of the transfer.[242] Where plaintiff conveyed to street railway a right of way across her land and agreed to pay certain money in consideration of which the railway agreed to extend its road over

[240] *Alabama:* Mobile & M. Ry. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Florida: Atlanta S. A. B. Ry. *v.* Thomas (Fla.), 53 So. 510.

Indiana: Louisville, N. A. & C. Ry. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

Iowa: Varna *v.* St. L. & C. R. Ry., 55 Ia. 677, 8 N. W. 624.

Kentucky: Louisville A. & P. V. E. Ry. *v.* Whipps, 18 Ky. 121, 80 S. W. 507; Louisville H. & St. L. Ry. *v.* Baskett, 121 S. W. 957.

Mississippi: Yazoo & M. V. R. R. *v.* Baldwin, 78 Miss. 57, 29 So. 763.

Oregon: Blagen *v.* Thompson, 23 Ore. 239, 31 Pac. 647, 18 L. R. A. 315.

Pennsylvania: Watterson *v.* Allegheny V. R. R., 74 Pa. 208.

Texas: Houston & T. C. Ry. *v.* Molloy, 64 Tex. 607.

Washington: Belt *v.* Washington W. P. Co., 24 Wash. 387, 64 Pac. 525.

Contra, on the ground that such increase is too uncertain:

Arkansas: St. Louis, I. M. & S. Ry. *v.* Berry, 86 Ark. 309, 110 S. W. 1049 (distinguishing St. Louis & N. A. R. R. *v.* Crandell, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42, where upon the wrongful discontinuance of an established station the diminution in value of buildings was allowed).

Illinois: Rockford, R. I. & St. L. R. R. *v.* Beckemeier, 72 Ill. 267.

Canada: Grand Trone C. E. *v.* Black, 17 Rev. Leg. 669.

And see *South Carolina:* Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 50, 19 L. R. A. (N. S.) 155.

Ante, § 194.

Depreciation of adjacent land not naturally resulting from failure to build the station cannot be recovered. Atlanta & S. A. B. Ry. *v.* Thomas (Fla.), 53 So. 510.

[241] 15 Kan. 435.

[242] Jewett *v.* Lawrenceburgh & U. M. Ry., 10 Ind. 539.

the right of way granted, and to run cars at stated intervals, without designating any period, and the extension was made and operated for several years, then abandoned because not profitable, the tracks taken up, and the right of way restored, and plaintiff relieved from paying money, the court held that the difference in value with road and expectation of continuing to run in the future over the value without the road was the proper measure of damages; but the present value must be the value in consideration of the possibility of getting the connection in some other way than through the action of the defendant.[243] And where defendant sold a site for a lumber mill with an agreement that the plaintiff should get track connections with the railroad, and connections were not furnished, the measure of damages is the difference between the value of the plant with and without the guaranteed connection.[244] The expense of hauling freight to a more distant point may also be recovered.[245]

§ 631. To build fences, walls, etc.

For breach of an agreement to build fences and cattle-guards, the measure of damages is the cost of building them.[246] But where a sea-wall, built by the defendant, had not been constructed according to his agreement, and he had promised the plaintiff to rebuild it, but failed to do so, and in reliance on such promise, the plaintiff himself delayed rebuilding; the loss of the use of the wharf, during the period of delay thus caused, was held the direct and immediate consequence of the defendant's failure, for which he was liable.[247] Where the grantee failed to build a wall on his own land, according to agreement, the grantor's measure of damages is not the cost of the wall, but the difference in value of his own adjoining land with and without the wall.[248]

In an action for a breach of contract by a railroad to construct

[243] Eckington & S. H. Ry. *v.* McDevitt, 191 U. S. 103, 24 Sup. Ct. 36, 48 L. ed. 112.

[244] South Memphis L. Co. *v.* McLean H. L. Co., 179 Fed. 417.

[245] Atlanta & S. A. B. Ry. *v.* Thomas (Fla.), 53 So. 510.

[246] Logansport, C. & S. W. Ry. *v.* Wray, 52 Ind. 578.

[247] Willey *v.* Fredericks, 10 Gray (Mass.), 357.

[248] Wigsell *v.* School, 8 Q. B. D. 357.

a farm crossing over a railroad it appeared that it would be necessary in building approaches to the crossing to take some of plaintiff's land. It was held that this was part of the expense of constructing the crossing, since the railroad would have to take the land and pay for it; and therefore in an action for breach of contract, the plaintiff could recover not merely the cost of building the crossing itself, but also the value of the land which would be occupied by the approaches.[249]

§ 631a. Negative agreements.

For breach of a negative agreement, the plaintiff may recover the damage caused him by the doing of the act contracted against. In Harrison *v.* Charlton,[250] the plaintiff purchased a lumber-yard. The lumber was to be measured, and in the meantime no lumber was to be added. For breach of the contract in adding lumber, the difference between the market and contract prices of the additional lumber was held to be the measure of damages. Where no actual damage can be proved to have resulted from the act, the plaintiff on general principles may recover the amount he has paid to secure the promise, or the proportionate part of his expense which is due to the promise. So where a printer, having contracted to print for his employer a thousand copies of a book, and no more, printed from the same types, while set up at the expense of his employer, five hundred other copies, for his own disposal, he was held liable to refund to his employer one-third part of the expense of setting up the types, no actual damage having been proved.[251]

§ 632. Not to engage in business.

The measure of damages upon breach of a contract not to engage in business is so difficult to estimate that the damages are usually liquidated. If no damages are stipulated in the agreement the plaintiff can, of course, recover only such as he proves he has sustained by the breach.[252] In the ordinary case

[249] Pittsburg, C., C. & St. L. Ry. *v.* Wilson (Ind. App.), 91 N. E. 725.

[250] 37 Ia. 134.

[251] Williams *v.* Gilman, 3 Me. 276.

[252] *Georgia:* Jenkins *v.* Temples, 39 Ga. 655, 99 Am. Dec. 482.

Ohio: Burckhardt *v.* Burckhardt, 36 Oh. St. 261, 42 Oh. St. 474, 51 Am. Rep. 842.

the profit realized by competitors in a transaction may be allowed on the ground that this profit presumably would have been realized by the plaintiff if it had not been for the competition. So where a borough contracted with a water company not to furnish water itself to its inhabitants and thereafter did furnish the water, the measure of damages was held to be equal to the water rents received by the borough less the additional expense the water company would have been at to supply these takers.[253] So where the defendant sells the good will of a business and engages not to enter into competition with the purchaser the measure of damages if he does so enter into competition will ordinarily be the profit on the sales which it can be shown the plaintiff would have made but for the competition.[254] And so where the plaintiff was granted the exclusive right to sell cigars on a fair ground, and other persons were then allowed to sell cigars on the same ground, he was entitled to recover as damages the profits he would have made on the cigars sold by the other people unless it is likely that he himself would not have been able to sell the cigars.[255] Of course in any case of this sort the facts may be such that sales by the plaintiff, if the defendant had not broken his contract, would be entirely conjectural.[256]

But the breach of contract may cause not only a loss of the profits from the actual business done by defendant, but an injury to the value of the plaintiff's business. In such a case the amount of depreciation may be recovered, and therefore evidence of the extent of business after the competition, and

[253] Bennett Water Co. *v.* Millvale, 200 Pa. 613, 50 Atl. 155, 202 Pa. 616, 51 Atl. 1098.

[254] Long *v.* O'Bryan, 91 S. W. 659, 28 Ky. L. Rep. 1062.

Strictly speaking the profit of the competitor is not the measure of damages but merely evidence of the plaintiff's loss; the true measure of damages being the loss of sales which plaintiff was prevented from making by defendant's act. Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 576.

[255] Whorley *v.* Tenn. C. E. Co. (Tenn. Ch.), 62 S. W. 346.

But in Montgomery C. U. A. Soc. *v.* Harwood, 126 Ind. 440, 26 N. E. 182, such damages were held too speculative on the ground that it could not be proved with certainty that the plaintiff would have sold the goods which the other person did in fact sell.

[256] Bradford *v.* Montgomery F. Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979.

Of course in such a case nominal damages may be recovered. Raymond *v.* Yarrington, 96 Tex. 443, 73 S. W. 800.

even after suit brought, is admissible as tending to show the amount of injury done to the business by competition.[257] So where the defendant sold a tavern-stand, with the agreement not to compete, and afterwards opened a competing tavern, the purchaser was allowed to recover the amount by which the value of his tavern was depreciated by the defendant's act; the court holding that this was an actual, certain, present loss.[258]

Where the defendant by breach of the contract so increased the demand for labor that the rate of wages was increased, it was held that the plaintiff might recover compensation for the increased wages he had to pay, and also for his loss by reason of workmen enticed away by the defendant.[259]

In Peltz *v.* Eichele [260] the defendant had covenanted not to manufacture certain articles. It was said that what the defendant had gained might be evidence of what the plaintiff had lost, but the plaintiff must show that he has suffered the loss, as, for example, in the decrease of his business, the stoppage of his factory, etc. In an action against a physician for breach of an agreement not to practice, the measure of damages was held to be such sum as the jury might find to have been the value of the practice which the plaintiff lost between the time when the defendant resumed practice and the time of instituting the suit.[261] Where a combination is formed to raise or depress the price of an article, the measure of damages for the breach of the agreement is the difference in price which would have been produced by the combination.[262]

§ 633. For exclusive agency.

Where the plaintiff was constituted sole agent of the defendant for sale of his goods, and the defendant allowed those to be sold by another, the plaintiff may recover as damages the profit which he would have made upon the sales actually made by the other.[263] So where the plaintiff was given exclusive

[257] Calucha *v.* Naso, 147 Ia. 309, 126 N. W. 146.

[258] Evans *v.* Elliott, 20 Ind. 283, 83 Am. Dec. 319.

[259] Whittaker *v.* Welch, 2 Pugs. (N. B.) 436.

[260] 62 Mo. 171.

[261] Warfield *v.* Booth, 33 Md. 63.

[262] Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506.

[263] *United States:* Cincinnati S. L. G. I. Co. *v.* Western S. L. Co., 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. 523.

territory for securing members for the defendant benefit society, and another person was allowed to secure members within the plaintiff's territory, the plaintiff was entitled to recover the profits which he would have made on the members actually secured within the territory.[264] And so upon breach of a contract by which defendant agreed to give the ferrying of all its passengers to the plaintiff, the plaintiff could recover the profit he would have made on ferrying the passengers.[265]

Where it is impossible to determine the exact amount of business the plaintiff would have obtained by showing the amount of business done by another in his place, recovery for loss of profits depends upon the certainty with which it can be proved that the profits would have been realized. Recovery can be had for the loss of such profits only as can be proved with reasonable certainty.[266] If the plaintiff's business was sufficiently established and supplied a sufficiently steady demand, he may recover not only commissions on sales actually made but also the probable profits of future sales.[267]

When the contract secures the right to exclusive territory, but owing to the newness or to the nature of the business it cannot be said that the business is an established one, many

California: Schiffman *v.* Peerless M. C. Co., 10 Cal. App. 913, 110 Pac. 460.

Michigan: Mueller *v.* Bethesda M. S. Co., 88 Mich. 390, 50 N. W. 319.

Minnesota: Emerson *v.* Pacific C. & N. B. Co., 96 Minn. 1, 104 N. W. 573.

New York: Wakeman *v.* Wheeler & W. Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Carr *v.* Hills Archimedean Lawn Mower Co., 12 Daly, 332.

South Carolina: Cofield *v.* E. A. Jenkins Motor Co., 71 S. E. 969.

Wisconsin: The Dr. Harter Medicine Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501.

This is of course the net profit, subtracting the value of the services which the defendant would have been obliged to render in order to make the sales. Dunham *v.* Hastings Pavement Co., 95 App. Div. 360, 88 N. Y. Supp. 835; Napier *v.* Spielmann, 54 Misc. 96, 103 N. Y. Supp. 982.

In the case of Carlson *v.* Stone-Ordean-Wells Co., 40 Mont. 434, 107 Pac. 419, the court thought it necessary for the plaintiff to prove that he would have made the sales if the defendant had not sold through another. But as the defendant's act has made it impossible to prove this (if it is in fact impossible) it would seem clear that the defendant and not the plaintiff should suffer from the impossibility of proving the amount of loss. *Ante,* § 170*a*.

[264] Hitchcock *v.* Supreme Tent of Knights of Maccabees, 100 Mich. 40, 58 N. W. 640.

[265] Wiggins Ferry Co. *v.* Chicago & A. R. R., 73 Mo. 389, 39 Am. Rep. 519.

[266] Federal I. & B. Bed Co. *v.* Hock, 42 Wash. 668, 85 Pac. 418.

[267] Kenney *v.* Knight, 127 Fed. 403.

authorities deny the right to damages for loss of expected profits. The defendant, a manufacturer of organs, agreed to sell the plaintiff organs, and that the plaintiff alone should sell organs at retail within a certain territory. The plaintiff went to expense to advertise and sell organs, and sold or could at once have sold a certain number of organs, which he ordered of the defendant. The defendant refused to supply them. It was held, in the first place, that no damages could be recovered on account of profits expected from future sales; for not only the uncertainty of the trade, but also the fact that the defendants could not prevent, and evidently were not expected to prevent the entire sale of the defendant's organs by others, made the general profits of the agreement entirely conjectural. The plaintiff was allowed, in the second place, the general expense for advertising and sale of the organs, on the principle that when the expected profits of an agreement cannot be recovered the expenses of the plaintiff in preparing to do his part may be recovered. In the third place, the plaintiff was allowed the profits on the sale of so many organs, as it was shown with reasonable certainty that he had sold or was on the point of selling.[268]

It would seem that the true rule in such a case is to find whether the exclusive agency has any value, and if so, to allow that. It would seem fair to infer that the agency was worth at least what the plaintiff had expended in time and money.[269]

In an Iowa case action was brought for breach of a contract by which plaintiffs were to have the right for five years to make use of defendant's warerooms without rent, and carry on the retail business of selling defendant's machinery within a certain territory, and also of selling their own goods. Plaintiffs were to receive the difference between the wholesale price of

[268] *West Virginia:* Sterling O. Co. *v.* House, 25 W. Va. 64.

See to the same effect the following cases:

United States: Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587.

Georgia: Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015.

Iowa: Howe Machine Co. *v.* Bryson, 44 Ia. 159, 24 Am. Rep. 735.

Wisconsin: Ramsey *v.* Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. 391.

[269] Taylor *v.* Spencer, 75 Kan. 152, 88 Pac. 544.

the machinery and the retail price at which they should sell it, and were to pay defendant a percentage of the actual profit on the other goods which they should sell. The contract was broken by the defendant, and plaintiffs excluded from the building at the end of two years. The receipts and profits of the business for these two years being shown, it was held that the plaintiffs could recover for loss of profits during the remaining three years of the term.[270]

§ 633a. To support.

For breach of a contract to support the plaintiff during his life the measure of damages is the present value of the plaintiff's support during the probable duration of his life; that is, such an amount as, properly invested, will from its income and principal furnish an amount annually during his life sufficient for his support, and leave nothing remaining at his death.[271]

Where the defendant agreed to support and care for the plaintiff's child, but neglected to give proper support, the measure of damages was held to be the difference in value between the care and treatment called for by the contract and what was actually received.[272] Where the condition of a bond for the plaintiff's maintenance required the defendant to furnish the plaintiff with "money necessary for him to spend whenever he thinks proper to visit his friends;" the defendant was held bound to furnish a sum proper for such expenses to the extent of reasonable visits. In an action of debt upon such a bond, there having been previously a demand and refusal of the sum necessary for a visit, the plaintiff's measure of damages was held to be the amount of money required for the visit, with interest.[273] On a breach of a contract by which plaintiff agreed

[270] Klingman *v.* Racine Sattley Co., 143 Ia. 435, 128 N. W. 1109.

[271] *Indiana:* Baughan *v.* Brown, 122 Ind. 115, 23 N. E. 695 (when death occurs before trial, take the amount required for support during actual duration of life); Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

Maine: Fales *v.* Hemenway, 64 Me. 373; Freeman *v.* Fogg, 82 Me. 408, 19 Atl. 907.

New York: Schnell *v.* Plumb, 55 N. Y. 592; Carpenter *v.* Carpenter, 66 Hun, 177, 20 N. Y. Supp. 928.

Oregon: Morrison *v.* McAtee, 23 Ore. 530, 32 Pac. 400 (where plaintiff was to furnish his own labor, deduct what he can earn by his labor during his life).

[272] Vancleave *v.* Clark, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519. See Ottoway *v.* Milroy, 144 Ia. 631, 123 N. W. 467.

[273] Berry *v.* Harris, 43 N. H. 376.

to live with deceased and take care of her during life, and deceased agreed to give her house and lot at her death to plaintiff or one of the members of the family, and deceased did not give the house and lot at her death either to plaintiff or to a member of the family, it was held that on account of the uncertainty as to the beneficiary the value of the house and lot could not be recovered; but the plaintiff should recover the value of her services.[274] And so where for any other reason the house or its value cannot be recovered, the value of the services may be recovered, less the value of any benefit which the plaintiff received while the agreement was being carried out.[275]

Where the contract to support another is made with or for the benefit of the plaintiff, who is already under an obligation to support the person in question, the plaintiff for breach of the contract may recover the amount he was thereby compelled to pay out for the support of the person.[276]

§ 633b. Of bailment.

Upon a lease of personal property, if the lessee fails to return the property in good condition the measure of damages is the amount of the rent and the diminished value of the property;[277] or if the property is not returned at all, the rent plus the value of the property.[278]

On a bailment for repairs or other work on the property by the bailee, where the bailee injures the property the measure of damages is the diminished value of the property less the cost of the work.[279]

[274] Stanton *v.* Miller, 14 Hun (N. Y.), 383. Qu.: it would seem that the contract having been executed, plaintiff, who had the right to sue, should have recovered the value of the house and lot, even though the deceased might, if she had chosen, have given it to another member of the family.

[275] Bovee *v.* Barrett, 101 N. Y. Supp. 322, 116 App. Div. 20.

[276] Case *v.* Case, 137 App. Div. 393, 121 N. Y. Supp. 746.

[277] *Connecticut:* Cadwell *v.* Town of Canton, 81 Conn. 288, 70 Atl. 1025 (steam roller).

Minnesota: Langhren *v.* Barnard, 132 N. W. 301.

Texas: Phillips *v.* Hughes (Tex. Civ. App.), 33 S. W. 157.

[278] Robinson *v.* Varnell, 16 Tex. 382.

[279] *New York:* May *v.* Georger, 21 Misc. 622, 47 N. Y. Supp. 1057, reversing May *v.* Gunther, 20 Misc. 659, 46 N. Y. Supp. 379; Miller *v.* Levy, 104 N. Y. Supp. 368 (injury to cloth while being sponged); Mayer *v.* La Piemme, 110 N. Y. Supp. 263 (damage to dress

For wrongful delay in returning property bailed the measure of damages, if the property is not injured, is the rental value of the property,[280] or if no rental value can be shown, interest on its value.[281] For wrongful failure to return, the value may be recovered.[282]

§ 633c. To collect a claim.

Where a claim is sent to a bank for collection and it negligently fails to collect, or to take necessary steps to preserve the claim or its security, it is liable for the loss thereby occasioned. Thus where a note is sent for collection, and the collecting bank fails at maturity to present it or to protest it, or to give due notice of protest, the measure of damages is *prima facie* the face of the note [283] which may be reduced by showing either inability to collect at maturity or continued possibility of collecting after its return to plaintiff.[284] So for delay in returning the note, by reason of which it became uncollectible, the bank is responsible for the face of the note.[285] Where a bank to which a secured note was sent for collection negligently lost the collateral security, which was land certif-

in cleaning it); Chaityn *v.* Stock, 120 N. Y. Supp. 89 (failure to dye skins according to sample); Gutschneider *v.* Pirosnick, 123 N. Y. Supp. 190 (damage to skins in dyeing).

Oklahoma: Southwestern C. S. O. Co. *v.* Stribling, 18 Okla. 417, 89 Pac. 1129 (injury to cattle bailed by failure to water).

[280] In Rollins *v.* Sidney B. Bowman Cycle Co., 96 App. Div. 365, 89 N. Y. Supp. 289, plaintiff left his bicycle with defendant to be repaired under an agreement that, when finished, it should be shipped to him at a certain place, where he intended to go to begin a bicycle trip, and that the repairs should be charged to him. Defendant afterwards refused to ship the wheel unless the repairs were first paid for. It was held that plaintiff's measure of damages was the difference between the price he was compelled to pay for a wheel to take the place of one wrongfully withheld by defendant and the value of such wheel after he returned from his contemplated trip.

[281] Porter *v.* Duval Co., 60 Misc. 122, 111 N. Y. Supp. 825.

[282] Carll *v.* Goldberg, 59 Misc. 172, 110 N. Y. Supp. 318.

[283] *Arkansas:* Second Nat. Bank *v.* Bank of Alma, 138 S. W. 472.

New York: First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 678.

[284] *Alabama:* Hendrix *v.* Jefferson Co. Sav. Bk., 153 Ala. 636, 45 So. 136, 14 L. R. A. (N. S.) 686.

Arkansas: Second Nat. Bank *v.* Bank of Alma, 138 S. W. 472.

New York: Howard *v.* Bank of the Metropolis, 95 App. Div. 342, 88 N. Y. Supp. 1070.

[285] Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312.

icates, the owner, being able to replace them, was entitled to recover the necessary expenses of replacing them.[286]

§ 633d. To expend labor on property.

In a very large class of contracts, such as provide for manufacture, construction, repairs, and transportation, the benefit to be derived from performance is the addition of value to property through the expenditure of labor. The consideration on the other side may, or may not, be pecuniary. The plaintiff in these cases recovers, as his measure of damages, the difference between the value of the property, as left by the defendant, and the value it would have had if the labor had been expended. There are cases where the plaintiff would be held obliged to reduce this loss if on breach he might have procured the performance of the contract by some other person and neglected to do so; but this subject is fully treated elsewhere. The difference in value may be got at in different ways, as has been well explained by the New York Court of Appeals in the case of Kidd *v.* McCormick.[287] This was an action brought by plaintiff to reach a trust fund deposited with the Union Trust Co. of New York. Plaintiff entered into a contract with defendants, T. and J. McCormick, by which it was agreed that plaintiff should sell seven lots of land to defendant J. McCormick, who should give back his bond and mortgage thereon for the purchase-money. The McCormicks further agreed to erect a dwelling upon each lot to be completed on July 1, 1877, plaintiff making to them certain advances to aid in their erection, and to be repaid to him when the houses had reached a certain stage of completion.

After the land had been conveyed, and the erection of the buildings commenced, the vendees procured a loan from defendants, C. B. & G. H. Granniss, secured by mortgages on four of the lots, and an agreement was made between all par-

[286] First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976. After loss of the collateral, the debtor gave a mortgage as additional security which the plaintiff was eventually obliged to foreclose; but it was held that the expense of foreclosure was too remote.

[287] 83 N. Y. 391.

ties that a certain portion of the moneys loaned by said Grannisses should be deposited in a trust company as collateral security for the completion of the dwelling-houses, and that said mortgages should have priority of plaintiff's mortgages on said lots. The vendees proceeded with the work till September 1, 1877, when they abandoned the houses in an unfinished condition and declined to complete them. Whereupon the plaintiffs went on and finished the buildings. The question was, what was the measure of plaintiff's damages?

Folger, J., said that the plaintiff's damages were the difference in the value of the premises, as they were with the houses unfinished, at the date of their abandonment, from what the value of them would have been had the houses been finished on that day according to the contract.[288] So where the defendant agreed to tow the plaintiff's coal from Pittsburg to Oil City, and failed to do so, and it was impossible to secure other means of transportation, the plaintiff was allowed the difference in the value of the coal at Pittsburg and at Oil City.[289] The plaintiff loaned money on a mortgage of certain uncompleted houses, which the defendant covenanted should be built in a certain manner; they were not so completed. The houses were sold on foreclosure, and it became impossible, therefore, to complete them. The measure of damages was held to be the difference in value of the houses as completed and as they should have been completed, at the time the plaintiff had notice of their deficient construction; not exceeding, however, the mortgage debt and interest at that time.[290] And where the work of repairing a house was not done according to the contract, but the work having been completed, it would be impossible to have the errors rectified except at enormous expense, the cost of such rectification was not allowed to be shown as evidence of the difference in value between the house as it was and as it should have been.[291]

[288] *Acc.*, Morton *v.* Harrison, 52 N. Y. Super. Ct. 305.

[289] McGovern *v.* Lewis, 56 Pa. 231, 94 Am. Dec. 60.

[290] Norway Plains Bank *v.* Moors, 134 Mass. 129.

[291] Morton *v.* Harrison, 52 N. Y. Super. Ct. 305.

§ 633e. To furnish water for irrigation.

For breach of contract to furnish water for irrigation purposes, if the water could be obtained elsewhere at a reasonable expense, the cost of obtaining it is the measure of damages.[292] If other water cannot be obtained, and no crop is raised, the measure of damages is the difference in value of the land with the water and without,[293] together, of course, with any expenditure made on the faith of obtaining the water and rendered valueless by failure to obtain it. If a crop is raised, but is damaged by the lack of water, the amount of damage, if proved with sufficient certainty, may be recovered;[294] and even if the crop is destroyed before reaching maturity, it has been held that the value if it reached maturity less the necessary expense of maturing and placing it on the market may be recovered.[295]

§ 633f. To take or furnish advertising.

For breach of a contract to take and pay for certain advertising space in the defendant's newspaper the measure of damages is *prima facie* the contract price, and the burden is on the defendant to diminish this amount.[296] And so for breach of contract to pay a certain sum for the privilege of placing advertisements on the roof of plaintiff's building, the measure of damages is the balance unpaid of the contract price, since the plaintiff is to be under no trouble or expense in the mat-

[292] Gagnon *v.* Molden, 15 Ida. 727, 99 Pac. 965.

[293] *California:* Pallett *v.* Murphy, 131 Cal. 192, 63 Pac. 366, 82 Am. St. Rep. 341.

Nebraska: Wade *v.* Belmont, I. C. & W. P. Co., 87 Neb. 732, 128 N. W. 514.

See *ante*, § 620.

[294] Hutchinson *v.* Mt. Vernon W. & P. Co., 49 Wash. 469, 95 Pac. 1023.

[295] Smith *v.* Hicks (N. Mex.), 95 Pac. 138, 19 L. R. A. (N. S.) 938.

Idaho: Rios *v.* Azcuenaga (Ida.), 115 Pac. 922.

[296] *Indiana:* Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384.

Massachusetts: Maynard *v.* Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877 (*semble*).

Michigan: Tradesman Co. *v.* Superior Mfg. Co., 147 Mich. 702, 111 N. W. 343.

New Jersey: McDermott *v.* De Meridor Co. (N. J. L.), 76 Atl. 331.

New York: Ware Bros. Co. *v.* Cortland C. & C. Co., 192 N. Y. 439, 85 N. E. 666, 22 L. R. A. (N. S.) 272, 127 Am. St. Rep. 914.

Washington: Starr Pub. Co. *v.* Charles Knosher & Co. (Wash.), 113 Pac. 569.

ter.[297] The fact that the plaintiff could get other advertisements would reduce damages only if he could not have received the compensation for such advertisements except for breach of the contract.[298] If for instance the defendant contracted to take all the advertising space in the paper, or all the space for display on the building, upon breach of the contract he should be allowed for what others would pay for the space; and so if the defendant's advertisement would in fact have filled the available space. But if the advertising space was in fact unlimited, defendant clearly should obtain no benefit from other advertisements.[299]

For breach of contract for accepting advertisements from plaintiff, who was to take the advertising space at an agreed price, the measure of damages is the value of the space to plaintiff; [300] if the parties contemplated his securing contracts from advertisers for the space, and he did so, he could recover the profits of such contracts.[301] If the defendant himself obtained advertisements for the space, this may be shown to indicate plaintiff's loss.[302] So in the case of Gardner *v.* The Roycrofters,[303] the publishers of periodicals sold to plaintiff the advertising privileges of the periodicals, reserving only a specified space for their own use, and they actually used more than the reserved space, the plaintiff was entitled to recover the profit he could have realized on the extra space.

§ 634. Assignments of judgment.

* In the case of an assignment of a judgment containing a warranty that the sum specified remained due and unpaid, when in fact no judgment had ever been entered up, the Supreme Court of New York held, in an action of covenant, that the measures of damages was not the amount recovered

[297] United M. R. & I. Co. *v.* American Bill Posting Co., 128 N. Y. Supp. 666.

[298] *Ante*, § 608.

[299] See, however, Tradesman Co. *v.* Superior Mfg. Co., 147 Mich. 702, 111 N. W. 343, where the court apparently allowed only the difference between the contract price and the price at which other advertisements could have been obtained, even by cutting the price.

[300] Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. Supp. 185.

[301] May *v.* Breunig (Misc.), 120 N. Y. Supp. 98.

[302] Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. Supp. 185.

[303] 134 App. Div. 45, 118 N. Y. Supp. 703.

as stated in the assignment of the judgment, but the amount of property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit.[304] It is worthy of notice here, that the amount of consideration or value paid did not appear on the face of the assignment, and that it is not stated in the report whether the evidence in regard to the amount of property owned by the alleged judgment debtor came from the plaintiff or defendant; although, as the declaration is stated to have averred that the plaintiff had property enough to satisfy the demand, the pleader seems to have thought that, regularly, it should have come from the plaintiff. It would seem that, *prima facie*, either the amount appearing to have been paid for the judgment, or the amount recovered by it, should be the measure of damages. If the assignment were treated as a chattel, then the price paid would again be the rule, subject to the plaintiff's right to show that the whole amount could have been recovered, and then for its value beyond the price; and also subject to the further right of the defendant to show that, owing to the judgment debtor's insolvency, it was worthless. If the analogy in the case of sheriffs were adopted, then the amount recovered by the judgment would be the *prima facie* measure, subject to the defendant's right to reduce the sum by showing that, owing to the judgment debtor's circumstances, its whole amount could not be collected.** It is well settled that the measure of damages is not the consideration. So where, in assigning a judgment, the defendants covenanted that there was then due a certain sum, and that they would not discharge the judgment, and it appeared that they had previously discharged one judgment debtor, it was held that the plaintiffs could recover the difference between the present value and the value it would have had if that debtor had not been discharged. In this case the price paid was only ten per cent of the judgment.[305] Where one of three judgment debtors had been released, it was held, in an action by the assignee of the judgments against the assignor for breach of covenant,

[304] Jansen *v.* Ball, 6 Cow. (N. Y.) 628.

[305] Bennett *v.* Buchan, 61 N. Y. 222, 19 Am. Rep. 272.

that, neither of the others having been released, in the absence of proof that the judgment was wholly valueless, the assignee could not, while retaining it, recover as if there had been a total failure of consideration. He would be entitled in such a case to the expenses of attempting to enforce the judgment against the released debtor.[306]

§ 635. Alternative contracts.

Contracts are sometimes in the alternative, that is, the promisee agrees to perform one of two things; for instance, to deliver an article or to pay a sum of money. This sometimes gives him his election, and the damages are measured by the rule most beneficial to him. The whole subject of alternative contracts is fully discussed in an earlier chapter.[307] It is important, however, to notice that a contract which was originally in the alternative may have ceased to be so, through the exercise of the option by one party or the other. As soon as the option is exercised, and one alternative chosen, the other falls entirely out of the case; and, if the contract is thereafter broken, the damages are to be determined as upon an ordinary contract to do what has been chosen by the party exercising the option. So where an insurance company after a fire, elected to rebuild a house, this converted the contract into a contract to build; and the amount of the policy no longer furnished any measure of damages. The house having been partially rebuilt and then left by the company, the measure of damages was the cost of completing the building so as to make it like the original house.[308] When the contract is broken while the alternative is still alive, the measure of damages, where the defendant has the alternative, is the value of the less valuable alternative.[309] So on a contract to deliver slaves between eight and ten years old the measure of damages is the value of slaves eight years old, since they are less valuable.[310] On a contract to pay a certain sum of money in

[306] Weston *v.* Chamberlain, 56 Barb. (N. Y.) 415.

[307] §§ 421–424.

[308] Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

[309] W. J. Holliday & Co. *v.* Highland I. & S. Co., 43 Ind. App. 342, 87 N. E. 249.

[310] Mudd *v.* Phillips, Litt. Sel. Cas. (Ky.) 50; Pope *v.* Campbell, Hardin (Ky.), 31.

paper or specie, the measure of damages is the value of the least valuable medium.[311] And on a contract to pay a certain amount "in Georgia, Alabama, or Tennessee bank notes or notes on any good men" the measure of damages is the same.[312]

Where, however, the performance of one alternative becomes impossible before the time for performance, this destroys the alternative, and the measure of damages is the value of the remaining alternative. Thus on a contract to give certain property or a fixed sum of money, if the property is destroyed or taken by title paramount the measure of damages is the amount of money named.[313]

What seems at first sight to be an alternative may be in reality an option to defendant to discharge a contract by the performance of some act; if the option is not accepted, the contract must be performed. Thus on a contract to break up certain land by the first of July, with an agreement that the contract may be discharged by the payment of $75.00 by the first of December, the contract becomes an absolute one to break up the land as soon as the first of December passes without a payment of the money; and upon breach on the first of July the measure of damages is the cost of breaking up the land.[314] And so where a machine was hired, to be paid for according to the amount of work done, of which the lessee was to keep an account, and if the lessee did not keep such account the lessor might, at his option, either himself keep the account, or charge the lessee in lien thereof five dollars per day, and the lessee did not keep the account, the lessor might insist on the payment of five dollars a day.[315]

III.—Waiver of Performance and Repudiation

§ 636. Express waiver by acceptance of partial performance.

When full performance by the plaintiff is expressly waived by the defendant, it is really the waiver of a condition, and the undertaking of the defendant thereupon becomes unconditional. If the undertaking is not then performed, the plain-

[311] White *v.* Green, 3 T. B. Mon. (Ky.) 155.

[312] Hixon *v.* Hixon, 7 Humph. (Tenn.) 33.

[313] Wolfe *v.* Parham, 18 Ala. 441.

[314] Wilson *v.* Graham, 14 Tex. 222.

[315] Standard B. F. Co. *v.* Breed, 163 Mass. 10, 39 N. E. 346.

tiff's loss is the whole benefit which was to come to him by the contract. So where there is an acceptance of partial performance in lieu of complete performance of an entire contract by one party to it, the other being ready to complete it on his part, compensation may be recovered for the whole benefit secured to the plaintiff by the contract.[316]

§ 636a. Repudiation of the contract.

Notice of repudiation of a contract by one of the parties may be relied upon by the other party as a waiver of performance on his side, and the latter may sue for a breach of the contract when the time comes for performance without himself doing any more acts in performance of his part of the contract.[317] Such waiver nevertheless does not entitle the plaintiff to any greater compensation than he would get if the notice of repudiation had not been given before the breach. The repudiating party must, of course, compensate the other for such damage as he inflicts; but he does not by his wrongdoing subject himself to a forfeiture. The measure of damages recoverable against him for non-performance is the ordinary measure for breach of such a contract: the value of the contract at the time for its performance, or in other words the

[316] *New York:* Ellis *v.* Willard, 9 N. Y. 529.

North Carolina: Ashcraft *v.* Allen, 4 Ired. L. 96.

[317] Cort *v.* Ambergate, N. & B. & E. J. Ry., 17 Q. B. 127. This is the case even in jurisdictions not accepting the doctrine of anticipatory breach of contract. Ripley *v.* McClure, 4 Ex. 345 (decided before the doctrine of anticipatory breach had been established in England); P. P. Emory Mfg. Co. *v.* Saloman, 178 Mass. 582, 60 N. E. 377.

In order to constitute an anticipatory breach the repudiation by defendant must in some way be accepted by the plaintiff. If he insists on the performance, the repudiation is not a breach.

Kentucky: Louisville Pk. Co. *v.* Crain, 141 Ky. 379, 132 S. W. 575.

Texas: Carlisle *v.* Green (Tex. Civ. App.), 131 S. W. 1140.

England: Michael *v.* Hart, [1902] 1 K. B. 482.

In such a case, the repudiating party is entitled to perform when the time for performance comes. B. B. Ford & Co. *v.* Lawson, 133 Ga. 237, 65 S. E. 444. And if the other party tenders performance at the time set in the contract, the repudiating party may retract his notice and accept performance and there will then be no breach. Ripley *v.* McClure, 4 Ex. 345. Consequently if the market value has altered between the notice of repudiation and the time for performance, the other party's damages may be less than they would have been if he had accepted the notice as an anticipatory breach. Rhodes *v.* Cleveland R. M. Co., 17 Fed. 426. The contract, to use the phrase commonly employed, is kept alive for the benefit of both parties.

profit of the contract. This, generally speaking, is the difference between the contract price and the cost of full performance;[318] in case of a contract for the sale of goods this will be equal to the difference between the contract price for the goods and their actual value at the time for delivery.[319] In the case of a contract for the manufacture and sale of goods, when the breach consists in a refusal to accept the goods, it will amount to the difference between the contract price and the cost of manufacture.[320] In many cases, however, the result of the notice of repudiation will be to stop performance by the plaintiff and in that way to cause a waste of his labor and materials. Whenever the result of the defendant's repudiation is to cause a waste of this sort to the plaintiff, compensation for this waste may be recovered in addition to the profit of the contract.[321]

§ 636b. Repudiation of contract performable in instalments.

Where a contract is performable in instalments, such, for instance, as a contract for the delivery of goods in stated amounts from time to time, and there is a repudiation during

[318] *Illinois:* Long *v.* Conklin, 75 Ill. 32.

Michigan: Goodrich *v.* Hubbard, 51 Mich. 62.

New York: McMaster *v.* State, 108 N. Y. 488, 15 N. E. 417.

England: Brown *v.* Muller, L. R. 7 Ex. 319.

[319] *Cases where the seller repudiated:*

Massachusetts: P. P. Emory Mfg. Co. *v.* Saloman, 178 Mass. 582, 60 N. E. 377.

Michigan: Leo Austrian & Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. Rep. 350.

England: Leigh *v.* Patterson, 8 Taunt. 540.

Cases where the buyer repudiated:

United States: Rhodes *v.* Cleveland R. M. Co., 17 Fed. 426.

Illinois: Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548.

Michigan: Simons *v.* Ypsilanti Paper Co., 77 Mich. 185, 43 N. W. 864.

England: Philpot *v.* Evans, 5 M. & W. 475.

[320] *United States:* Hinckley *v.* Pittsburgh Steel Co., 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. 875.

Virginia: Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988.

[321] *Nebraska:* Hale *v.* Hess, 30 Neb. 42, 46 N. W. 261.

New York: Dunn *v.* Allen, 55 App. Div. 637, 67 N. Y. Supp. 218.

So where the defendant contracted with the plaintiff for ten-inch leather hose to be manufactured by the plaintiff, and repudiated the contract after the leather had been cut, and there was no sale for larger than nine-inch hose, the plaintiff was entitled to recover not only the profit that would have been made on the contract if it had been fully performed, but also the waste caused by cutting the leather down for nine-inch hose. City of Chicago *v.* Greer, 9 Wall. 726, 19 L. ed. 769.

the progress of the performance, the damages for a breach consisting of the non-performance of subsequent instalments is to be estimated as at the time for the performance of each, and not as at the time for the performance of the last instalment. If, for instance, between the time of the first breach and of the final breach the value of goods to be delivered fluctuates, the buyer who has failed to receive the instalments due him cannot demand damages based on the value of the goods at the time the last instalment should have been delivered, but he must be content with a basis of compensation which will give him the value of each instalment at the time it should have been delivered.[322] If, however, when delay occurs in the course of delivery, the parties by mutual agreement extend the time for delivery, so that when a breach finally happens, it is a breach of what has come to be an obligation at that time to deliver all the overdue instalments, the damages are of course to be estimated as for non-delivery of all the articles at this agreed time.[323]

§ 636c. Continuance of performance after repudiation.

A question of some difficulty arises where, in spite of notice of repudiation, the plaintiff insists upon proceeding with the performance, and attempts to charge the defendant in some way with the cost of the complete performance. If such a course does not enhance the damages he may clearly do so. This is the case where the contract is for the manufacture and delivery of goods readily salable in the market. The measure of damages for the breach of such a contract is the difference between the contract price and the cost of manufacture. This difference will not be increased by the act of the manufacturer in completing the manufacture. Indeed, it may be incumbent upon him to complete the manufacture notwithstanding

[322] *United States:* Cherry V. I. Works *v.* Florence I. R. Co., 64 Fed. 569, 12 C. C. A. 306.

Illinois: Delaware & H. C. Co. *v.* Mitchell, 92 Ill. App. 577.

Michigan: Goodrich *v.* Hubbard, 51 Mich. 62.

Wisconsin: Hill *v.* Chipman, 59 Wis. 211, 18 N. W. 160.

England: Brown *v.* Muller, L. R. 7 Ex. 319; *Ex parte* Llansamlet T. P. Co., L. R. 16 Eq. 155; Barningham *v.* Smith, 31 L. T. Rep. 540.

[323] *United States:* Ralli *v.* Rockmore, 111 Fed. 874.

England: Ogle *v.* Earl Vane, L. R. 2 Q. B. 275.

the notice of repudiation. If, for instance, the notice should reach the manufacturer of such goods at the time when his product was incomplete, it would cause a waste of his labor and material to leave the product uncompleted. If he could stop at that time and charge the defendant with the waste caused by the incompletion of his product, he would thereby not diminish, but unnecessarily increase the damages to be paid by the wrongdoer; the waste of labor and material would be unnecessary, and for this reason he could not compel the defendant to pay for it. In such a case, therefore, the manufacturer must complete the process of manufacture, and thus enable himself to obtain the market price for his goods.

If, on the other hand, any further expenditure in performance of the contract after the reception of the notice of repudiation would be a mere waste, the plaintiff cannot incur such an expense, but must cease performance upon reception of the notice of repudiation. This doctrine was first clearly established in the leading case of Clark *v.* Marsiglia.[324] In that case it appeared that the defendant delivered a number of paintings to the plaintiff to clean and repair, and after the plaintiff had commenced work upon the paintings the defendant desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures and claimed to recover for doing the whole work and for materials furnished; insisting that the defendant had no right to countermand the order he had given. The court said: "The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract and thereby incurred a liability to pay such damages as would include a recompense for the labor done and material used, and such further sum in damages as might, upon legal principle, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would have otherwise been." And again: "In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect of the part left

[324] 1 Denio (N. Y.) 317.

unexecuted; and to persist in accumulating a large demand is not consistent with good faith toward the employer." This decision has been almost universally followed.[325]

Occasion for the application of the principle of Clark *v.* Marsiglia usually occurs where the contract is for work to be done on the property of the defendant,[326] or where a specific article is to be made for the defendant which will be of use to no one else.[327] But the same rule applies even in the case of a sale of ordinary goods salable in the market, when the plaintiff insists upon shipping the goods to the place of delivery, at considerable expense for carriage, although he has received notice that the goods will not be accepted by the purchaser.[328]

Even in the case of a contract of special value to the defendant, it might be less wasteful to continue to work after notice of repudiation than to stop work, though so far as the defendant is concerned the performance of the contract would be

[325] *United States:* Rhodes *v.* Cleveland R. M. Co., 17 Fed. 426; Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

Maryland: Heaver *v.* Lanahan, 74 Md. 493, 22 Atl. 263, 20 L. R. A. 126.

Minnesota: Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80.

Missouri: American P. & E. Co. *v.* Walker, 87 Mo. App. 503; Peck *v.* Kansas City M. R. & C. Co., 96 Mo. App. 212, 70 S. W. 169.

New York: Dillon *v.* Anderson, 43 N. Y. 231; Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648; Mendell *v.* Willyoung, 42 Misc. 210, 85 N. Y. Supp. 647; Dunham *v.* Hastings Pavement Co., 95 App. Div. 390, 88 N. Y. Supp. 835; Sharp's Pub. Co. *v.* Grant, 1 N. Y. City Ct. 314.

North Carolina: Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

North Dakota: Davis *v.* Bronson, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655.

Rhode Island: Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Tennessee: Gardner *v.* Deeds, 116 Tenn. 128, 92 S. W. 518; Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981.

Vermont: Danforth *v.* Walker, 37 Vt. 239, 40 Vt. 257.

Williston's Pollock on Contracts, p. 349.

[326] *Maryland:* Heaver *v.* Lanahan, 74 Md. 493, 22 Atl. 263, 20 L. R. A. 126.

Minnesota: Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80.

New York: Clark *v.* Marsiglia, 1 Den. 317.

North Dakota: Davis *v.* Bronson, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655.

[327] *United States:* Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

Missouri: American P. & E. Co. *v.* Walker, 87 Mo. App. 503; Sharp's Pub. Co. *v.* Grant, 1 N. Y. City Ct. 314.

[328] Sonka *v.* Chatham, 2 Tex. Civ. App. 312, 21 S. W. 948. But see Roebling *v.* Lock Stitch Fence Co., 130 Ill. 660, 22 N. E. 518.

useless to him. This happens where the work for the defendant is only part of the entire process. So where the article to be delivered to the defendant was only a by-product of manufacture the plaintiff would of course not be called upon to stop the whole manufacture.[329] This principle was involved in the interesting case of Martin *v.* Meles.[330] This was a contract by which the plaintiff was to bring and prosecute a test case in defence of a patent. The suit was brought for the benefit of a large number of persons interested, who severally agreed to pay a share of the cost of services and expenses. After suit had begun, one of the parties gave notice to the plaintiff to discontinue on his behalf. In spite of the notice the plaintiff continued to prosecute the suit and charged the defendant with his portion of the expenses; although if the suit had been dropped upon receipt of his notice of repudiation a large part of the expenses would have been avoided. The court held that the plaintiff was not obliged, under the circumstances, to discontinue the suit at the defendant's request. Mr. Chief Justice Holmes said that the doctrine of Clark *v.* Marsiglia would not apply in such a case, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent. So where a railway advertising company agreed to place defendant's cards in the street cars of a certain city and defendant repudiated the contract the next day, the company was held entitled to recover the entire contract price, having gone on with the performance;[331] but this was not on the ground of performance, but because it appeared that the plaintiff was unable otherwise to rent the space.[332]

The doctrine of Clark *v.* Marsiglia practically prevents the plaintiff from keeping the contract alive for the defendant's benefit in any case to which it applies. In Ault *v.* Dustin[333] the defendant agreed to manufacture special sizes of rope for

[329] Southern Cotton Oil Co. *v.* Hefflin, 99 Fed. 339, 39 C. C. A. 546; but see James H. Rice Co. *v.* Penn. P. G. Co., 81 Ill. App. 407.

[330] 179 Mass. 114, 60 N. E. 397.

[331] Railway Advertising Co. *v.* Standard R. C. Co., 178 N. Y. 570, 70 N. E. 1108, affirming 83 App. Div. 191, 83 N. Y. Supp. 338.

[332] *Ante*, § 633*f*.

[333] 100 Tenn. 366, 45 S. W. 981.

the plaintiff, and before manufacture plaintiff cancelled the contract, but defendant wrote refusing to permit cancellation. Later, the price of rope having risen greatly, plaintiff wrote ordering shipment; but defendant had not manufactured the rope, and it was then too late to do so. The court held that the defendant was forbidden, by the doctrine of Clark *v.* Marsiglia, to manufacture the rope, and he was therefore not in default for failure to deliver it in spite of his refusal to accept cancellation as a breach.

§ 636d. Anticipatory breach: damages upon breach before time for performance.

In England and most of the United States, the repudiation of a contract by one of the parties to it before the time for performance has arrived amounts to a tender of a breach of the contract; and if it is accepted as such by the other party it constitutes a so-called "anticipatory breach," and the injured party is at liberty to begin suit at once and to recover entire damages.[334] The damages are to be assessed, of course,

[334] *United States:* Roehm *v.* Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953; In re Neff, 157 Fed. 57, 84 C. C. A. 561 (by bankruptcy); Golden C. M. Co. *v.* Repson C. M. Co., 188 Fed. 179.

California: Remy *v.* Olds, 88 Cal. 537, 26 Pac. 355.

Florida: Sullivan *v.* McMillan, 26 Fla. 543, 557, 8 So. 450; Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193; Hall *v.* Northern & Southern Co., 55 Fla. 242, 46 So. 178.

Illinois: Fox *v.* Kitton, 19 Ill. 519, 534; Follansbee *v.* Adams, 86 Ill. 13; Lake Shore & M. S. Ry. *v.* Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.

Indiana: Adams *v.* Byerly, 123 Ind. 368, 24 N. E. 130.

Iowa: Crabtree *v.* Messersmith, 19 Iowa, 179; McCormick *v.* Basal, 46 Iowa, 235.

Maryland: Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

Michigan: Hosmer *v.* Wilson, 7 Mich. 294, 304, 74 Am. Dec. 716; Platt *v.* Brand, 26 Mich. 173.

Minnesota: Kalkhoff *v.* Nelson, 60 Minn. 284, 62 N. W. 332.

New Jersey: O'Neil *v.* Supreme Council, 70 N. J. L. 410, 57 Atl. 463.

New York: Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Howard *v.* Daly, 61 N. Y. 362, 374, 19 Am. Rep. 285; Ferris *v.* Spooner, 102 N. Y. 10, 5 N. E. 773; Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 487, 33 N. E. 561.

Pennsylvania: Girard *v.* Taggart, 5 S. & R. 19; Hocking *v.* Hamilton, 158 Pa. 107, 27 Atl. 836, 38 Am. St. Rep. 830; Mountjoy *v.* Metzger, 9 Phila. 10.

Virginia: Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749; Lee *v.* Mutual Life Ass'n, 97 Va. 160, 33 S. E. 556.

West Virginia: Davis *v.* Grand Rapids S. F. Co., 41 W. Va. 717, 24 S. E. 630.

as of the date of the breach; nevertheless, they are to be a compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time of the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms. The damage caused by such a premature destruction is, to be sure, due to the consequent failure to secure performance; but this is a failure to secure performance according to its original terms, that is, performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract, regarded as an article of property, the measure of damages is the value of such property at the time of its destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, the exact measure of damages upon an anticipatory breach is in the ordinary case precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought suit, after the time of performance, for the non-performance at the time set. In other words, though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance.[335]

Wisconsin: Walsh *v.* Myers, 92 Wis. 397, 66 N. W. 250.

England: Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. Q. B. 455.

Canada: Ontario L. Co. *v.* Hamilton B. M. Co., 27 Ont. App. 346.

Contra, Massachusetts: Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384.

Nebraska: Carstens *v.* McDonald, 38 Neb. 858, 57 N. W. 757; King *v.* Waterman, 55 Neb. 324, 75 N. W. 830.

North Dakota: Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760.

And see 14 Harvard Law Review, 428 *et seq.*

[335] *United States:* Roehm *v.* Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953; Missouri Furnace Co. *v.* Cochran, 8 Fed. 463; Cherry V. I. W. *v.* Florence I. R. Co., 64 Fed. 569, 12 C. C. A. 306.

Kansas: York D. M. Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788.

Michigan: Lee *v.* Briggs, 99 Mich. 487, 58 N. W. 477.

Thus in the leading case of Roper *v.* Johnson [336] it appeared that a contract by the defendant to deliver certain goods had been repudiated by him before the time for performance, and that this repudiation had been accepted as a breach by the plaintiff, who brought suit at once. The court held that the measure of damages was the difference between the contract price and the market price at the time for performance. So in the case of Roehm *v.* Horst,[337] where the purchaser repudiated a contract of sale before the time for delivery and the seller brought suit at once, it was held that the basis of damages in the absence of special circumstances was the cost of performance at the time fixed therefor by the contract.

§ 636e. Damages affected by fluctuations in the market.

Where the trial of the action is not had until after the time fixed by the contract for performance this rule will not result in any uncertainty as to the amount of damages; for market values at the time fixed for performance can be shown, and the amount of damages is therefore no more uncertain than it would have been if suit had been brought after the time fixed for performance. If, however, suit is brought and actually comes to trial before the time fixed for performance, there is an element of uncertainty, because the jury can tell only by conjecture what would be the actual cost of performance at the time set therefor. This, however, should be regarded as no objection to the application of the ordinary rule of damages. It is true that in such a case values at the time of breach, or rather at the time of trial, will be introduced in evidence and will probably form the basis upon which the jury will find the values at the date for performance; but such actual

New York: Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982.

Pennsylvania: Woldert Grocery Co. *v.* Wilkinson, 39 Pa. Super. Ct. 100.

West Virginia: Davis *v.* Grand Rapids S. F. Co., 41 W. Va. 717, 24 S. E. 630.

England: Roper *v.* Johnson, L. R. 8 C. P. 167.

Canada: Ontario Lantern Co. *v.* Hamilton B. M. Co., 27 Ont. App. 346.

In case of a contract for the entire product of a manufactory, the profit made by other employment of the factory should be subtracted. Allen *v.* Field, 130 Fed. 641.

[336] L. R. 8 C. P. 167.

[337] 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

values are introduced in evidence not because values at the time of breach are of any importance in themselves, but merely as evidence to prove the probable values at the time of performance. It is also true that by this means the plaintiff may in fact get a larger verdict than he would have obtained if the trial had been held after the date for performance. This will happen, for instance, when the market unexpectedly rises or falls, as the case may be, between the time of trial and time of performance. But as Mr. Chief Justice Fuller said in the case of Roehm *v.* Horst,[338] "Although he may receive his money earlier in this way, and may gain or lose by the estimate of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

This is the generally accepted view; but in the important case of Masterton *v.* Mayor of Brooklyn [339] a different view was taken by the majority of the court. The doctrine of the decision is examined in another connection.[340] The argument in favor of the view there taken, so far as it is applied to cases of anticipatory breach, is often put in the following form. Damages are to be assessed as of the time of breach. Since the breach occurs at the moment of repudiation, damages are to be assessed as of that moment; and therefore when the assessment of damages involves an estimation of the value of commodities, that estimation should be made as of the time of the breach. This conclusion, however, is fallacious. It is true that the damage is to be assessed as of the time of the breach, but what is that damage? Suppose, for instance, we take a contract for the delivery of a thousand bushels of oats on the first of July, and suppose the contract is repudiated by the seller on the first of April; the loss thereby caused to the purchaser is not the loss at the time of so many bushels of oats. He had no right to the oats at that time by the original contract, nor did he gain a right to a thousand bushels of oats at that time by the repudiation of the original contract. His right at that time was a right to have one thou-

[338] 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

[339] 7 Hill (N. Y.), 62.

[340] *Post*, § 636*j*.

sand bushels of oats delivered to him on the first of July; and it was the right to have the oats on the first of July, and not to oats on the first of April, that he lost by the repudiation. Now a right to a delivery of oats on the first of July is a right, the value of which, in the ordinary case, depends and can only depend upon the value of the oats to be delivered at the time for delivery. The value of oats on the first of April is utterly immaterial.

To this statement, however, there may be one apparent exception which is, however, really an illustration. The thing lost on the first of April, as has been seen, is a contract for delivery of July oats. While the value of a contract is ordinarily measured by the value of the performance of it, that is not true in every case. There are certain contracts for the future delivery of commodities which have a present market value, not directly dependent upon the ultimate value of performance. For instance, in the case just stated, if there were a produce exchange in which oats could be bought for future delivery, in other words, in which there was a market for contracts for the future delivery of oats, a contract for the delivery of oats on the first of July would, on the first of April, have a certain market value fixed by bargains on the floor of the produce exchange; and on general principles of the law of damages that market value would be taken as the value of the contract, and not the benefit ultimately to come from the performance of it. If then the defendant destroyed this contract on April first by a repudiation of it, the loss caused would be measured not by the value of the future delivery but by the market value of that contract on April first. It must be clearly noticed that this market value of the contract on April first is not the same thing as the difference between the contract price and the actual value of oats on April first. July oats may be quoted at a very different price from April oats; and the value of the contract would be the value of July oats on April first, not the value of April oats. In the case of an anticipatory breach of such a contract, therefore, the true measure of damages would seem to be the market quotation of goods of the sort for future delivery, and not the conjectural or even the actually proved

profit arising from the contract in July.[341] If there is no market for July oats, the market value cannot be resorted to.

This doctrine, as will be seen, applies only in a narrow class of cases; namely, those where there is a market value for "futures." In several such cases, however, the courts, not noticing this distinction but seeing that the current quotations furnished the proper measure of damages, have attempted to work this out by some application of the rule denying recovery for avoidable consequences. It therefore will be necessary, in order to complete the consideration of this subject, to consider the applicability of the rule of avoidable consequences to breaches of contract before the time for performance.

In a recent New York case [342] the action was against a telegraph company for negligence in transmission. Plaintiff in December ordered a sale of 20,000 bales of cotton for March delivery at 12.70 per pound; as received by his agent the message read "1207." The cotton was sold at prices below 12.70, and the plaintiff replaced himself by purchases of March cotton at the best prices then obtainable. The Court of Appeals held the measure of damages to be the cost of this replacement (which was in accordance with the custom of the Cotton Exchange), and as untenable the argument that the plaintiffs might have done better in March, and were consequently bound to await the entirely uncertain and speculative developments of a future market. The judgment below was reversed, but the opinion of the Appellate Court as to the measure of damages seems conclusive. It was argued that the order was to sell cotton actually on hand, deliverable in March, but the decision appears to involve the view that the action was for recovery of damages representing losses caused by a December replacement on March contracts.

§ 636f. Avoidance of loss by making forward contracts.

It appears to be the accepted doctrine in the English courts

[341] The value of anything for which there is a market is the market value, even though the actual economic worth of it may be different. National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 56 N. E. 257, 78 Am. St. Rep. 487. *Ante*, § 242.

[342] Weld *v.* Postal T. C. Co., 199 N. Y. 88, 92 N. E. 415. In the Appellate Division there was no opinion. 132 App. Div. 924, 116 N. Y. Supp. 1150.

that where the plaintiff has elected to consider notice of repudiation as a breach of the contract it is his business to go into the market, if such is the reasonable course to pursue, and buy or sell, as the case may be, for future delivery, as a means of avoiding the loss caused by the breach. This doctrine was certainly not established by the earlier cases;[343] but in the case of Roth *v.* Taysen [344] the court laid down a novel doctrine which appears to have been accepted in England. In that case the buyer of goods repudiated his contract at a time when the market was obviously falling. The court held that the seller was bound to sell the goods at once upon accepting the notice as a breach, and that he could charge the defendant with only such damages as would have accrued if he had sold within a reasonable time. The court in this case relied on the special circumstance that by a clause in the contract either party, upon breach by the other, might, after written notice, resell or repurchase on the other's account. In view of this clause it seems clear that it was the plaintiff's business, in accordance with the doctrine of Clark *v.* Marsiglia, to sell on the defendant's account. In the later case of Nickol *v.* Ashton,[345] the court expressed *obiter* its concurrence in this decision upon the general principle that it was the business of the injured party to reduce his damages.

[343] In the early case of Lee *v.* Paterson, 8 Taunt. 540, where the notice of repudiation was not accepted as a breach, Burrough, J., in holding that damages should be based on the market price at the time for performance, said: "The plaintiff was not bound to go into the market and buy. He never assented to *rescind* the contract." This has been thought by some courts to indicate that if he had accepted the repudiation as a breach, he might have been obliged to go into the market and buy; it is entirely clear, however, that in using the word *rescind* Mr. Justice Burrough did not have in mind the doctrine of anticipatory breach; which was not laid down by any English court until more than fifty years after his time. He had in mind the rescission of the contract in the true sense. In the later case of Brown *v.* Muller, L. R. 7 Ex. 319, where also notice of repudiation was not accepted as a breach, the court said distinctly that the plaintiff need not go into the market and buy other goods on the defendant's account. In Roper *v.* Johnson, L. R. 8 C. P. 167, where the repudiation was accepted and suit brought at once, the court clearly expressed the view, *obiter*, that the plaintiff was under no obligation to go into the market and attempt to get a new contract.

[344] 12 T. L. R. 211, 73 L. T. Rep. 628.

[345] [1900], 2 Q. B. 298.

In this country actual authorities on the point are few. In the case of Kadish *v.* Young,[346] where the plaintiff refused to accept notice of repudiation as a breach, the court held that the plaintiff was not bound to make a forward contract for the purchase of property. In the case of Missouri Furnace Co. *v.* Cochran,[347] where after receiving notice of repudiation the buyer at once brought suit and immediately made a forward contract for the purchase at the then market rate, which afterwards and before the time set for performance declined, the court held that the measure of damages was to be governed by the actual market price at the time fixed by the contract for delivery, and that he could not get damages based upon the contract for future delivery which he had made at the time of repudiation.[348] There was no claim in this case that it was unwise for the plaintiff to make a second contract; and in fact it appears that a consequential loss would have followed, if other goods had not been bought. The case seems to have been one of a proper attempt to avoid consequential loss, and the decision is therefore questionable on that ground.[349] In Hinckley *v.* Pittsburgh Steel Co.,[350] where the plaintiff had contracted to manufacture and deliver steel rails and the defendant had cancelled the order before the time for delivery, the court held that the plaintiff need not reduce the damages by completing the manufacture of these particular rails and selling them to others, but that the measure of damages was the difference between the contract price and the cost of manufacture.[351] In Rochm *v.* Horst [352] the court appeared to take it for granted that the damages would be reduced by any circumstances of which the plaintiff ought reasonably to have availed himself, and added, "He may show what was the value of the contract by showing for what price he could have made sub-contracts." The contract was for the sale of hops, a commodity in which futures were

[346] 108 Ill. 170, 48 Am. Rep. 548.

[347] 8 Fed. 463.

[348] See Danforth *v.* Walker, 40 Vt. 257.

[349] *Ante*, § 226*b*.

[350] 121 U. S. 264, 7 Sup. Ct. 875, 30 L. ed. 967.

[351] *Acc.*, Allen *v.* Field, 130 Fed. 641; and see United States *v.* Withers, 130 Fed. 696.

[352] 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

bought and sold, and the buyer repudiated. The suggestion of the court therefore is that since "futures" in hops could be bought in the market the market price of the futures furnished a measure of the value of the contract. The court evidently does not mean to suggest that it was the duty of the plaintiff to mitigate the damages by entering into a future contract. Indeed, as the plaintiff was the seller he could have reduced his damages in the sense of the English decisions only by *selling* for future delivery, not by buying. The suggestion of the court was neither that he should sell nor that he should buy, but that the value of his contract was determined by subtracting from the contract price the cost at the time of breach of a similar contract for the future delivery of hops. In other words, this case is an application of the principle already explained, that where future performance of a contract has a market value at the time of the breach that value is to be the basis of recovery, and not the profit of the contract at the time fixed for delivery. It thus appears that the doctrine of Roth *v.* Taysen finds no support in the Supreme Court of the United States.

On principle it seems perfectly clear that the repudiator of a contract cannot under any circumstances call upon the other party to make forward contracts for his benefit, merely for the purpose of lessening or seeming to lessen the direct loss of profits of the contract.

If, however, the plaintiff would be entitled to consequential damages by reason of the fact that he had given notice to the other party, or that the contract itself is notice, that in case of breach consequential damages would happen, then it is quite true that if notice of repudiation is given and is accepted as a breach he should take steps to avoid such consequential damages. If, for instance, the plaintiff makes a contract for the purchase of goods for future delivery, giving notice of a profitable contract of resale, and the seller repudiates before the time for performance, the buyer, if he accepts the repudiation as a breach, must buy elsewhere, if he can, to avoid the consequential loss of the resale; if he could buy elsewhere and fails to do so he cannot charge the defendant with the loss of the resale.

IV.—Prospective Damages

§ 636g. Entire and divisible contracts.

A question of interest and importance is sometimes presented in regard to prospective damages, or damages which accrue after the suit is brought. In the case of continuing agreements, or agreements to do specified acts at certain successive periods,* it has been doubted whether the damage should be assessed as at the time of the first breach, or whether the whole period of the contract is to be gone through, and an estimate made of the damages sustained, with reference to each period fixed for performance. This, again, depends, to a certain extent, on another question, whether the contract will admit of more than one action being brought on it, or whether the first recovery is conclusive of the plaintiff's rights. It is an ancient rule of our law that one action only can be maintained for the breach of an entire contract; and a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding;[353]** if a plaintiff recover compensation for part of a single cause of action, it satisfies the whole.[354] But a recovery of nominal damages for the infringement of a right will not bar a suit for actual damages sustained after the bringing of the first suit; and in the case of severable contracts, successive suits for actual damages may be brought from time to time as the damages are sustained, and in each suit the party may recover such damages as he has sustained before its commencement not barred by a previous recovery.[355]

When a continuing contract is broken, and suit is brought before the completion of the term, damages are generally recoverable only for breaches suffered up to the date of the writ;[356] but all damages, prospective as well as past, arising

[353] *Massachusetts:* Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611.

New York: Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448.

England: Rudder *v.* Price, 1 H. Bl. 547.

[354] *Connecticut:* Marlborough *v.* Sisson, 31 Conn. 332.

New Jersey: Baker *v.* Baker, 28 N. J. L. 13; Veghte *v.* Hoagland, 29 N. J. L. 125.

[355] McConnel *v.* Kibbe, 33 Ill. 175.

[356] *Kansas:* Kansas & C. P. Ry. *v.* Curry, 6 Kan. App. 561, 51 Pac. 576 (to issue annual pass).

Massachusetts: Fay *v.* Guynon, 131 Mass. 31.

Nebraska: Wittenberg *v.* Mollyneaux,

from such breaches must be recovered in such an action, since no further action will lie for such breaches.[357]

If, however, there has been such a breach of the contract as to destroy the whole purpose of it, so that no future performance is possible if the object of the agreement is to be preserved, entire damages may be recovered.[358] * The difficulty is to determine in what cases the contract is entire. The question was first presented on contracts to pay debts by instalments. Debt was then the only form of action to recover a sum certain; and it was held that on a bond or other contract to pay divers sums on divers days, no action of debt would lie until all the days were past.[359] So stood the law until the reign of Elizabeth, when the decision in Slade's case introduced the action of assumpsit into general practice.[360] The rule was then modified as regards the action of assumpsit, and in cases of money payable by instalments, the plaintiff was allowed to proceed upon the first default; but it was still held that the judgment was a full satisfaction, and the plaintiff therefore recovered damages for all the prospective breaches.[361] This latter rule in regard to assumpsit was further modified by a decision made in the reign of Charles II, when, in an action on an award to pay several sums at several times, the court held that an action might be brought for each sum when due, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became

59 Neb. 203, 80 N. W. 824 (not to use property sold as a hotel for two years).

New York: Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. 589; Cummins *v.* Hanson, 10 Daly, 493 (to board with plaintiff for a term).

[357] *Florida:* Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687.

Illinois: Crabtree *v.* Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324.

[358] *Maine:* Sutherland *v.* Wyer, 67 Me. 64.

Massachusetts: Amos *v.* Oakley, 131 Mass. 413; Parker *v.* Russell, 133 Mass. 74; R. H. White Co. *v.* Jerome H. Remick & Co., 198 Mass. 41, 84 N. E. 113.

Michigan: Mott *v.* Penoyar, 153 Mich. 273, 116 N. W. 1110.

New Hampshire: Lamoreaux *v.* Rolfe, 36 N. H. 33.

New York: Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285.

North Carolina: Wilkinson *v.* Dunbar, 149 N. C. 20, 62 S. E. 748.

Vermont: Royalton *v.* Royalton & W. T. Co., 14 Vt. 311; Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140.

[359] Fitzh. Nat. B. 131; Taylor *v.* Foster, Cro. Eliz. 807; Milles *v.* Milles, Cro. Car. 241.

[360] 4 Co. 92*b*.

[361] Beckwith *v.* Nott, Cro. Jac. 504.

due, *toties quoties*.[362] The rule in debt, however, appears to have remained unaltered.[363] So stands the matter in regard to agreements for the payment of money at specific future periods. In New York the rule which enforces the indivisibility of entire demands has been applied to open accounts for goods sold; and it has been held that the whole of such an account must be recovered, if at all, in one suit.[364] But in Massachusetts the doctrine of this case has been denied.[365] **

In any case of continuing contract, an absolute refusal by one party to go on with the contract when the time has arrived for him to perform, or after part performance, constitutes an entire breach of the contract.[366] If there is an entire breach, all damages prospective as well as past, must be recovered in the one action; the plaintiff, failing to obtain entire damages in his first suit, cannot maintain a later action.[367]

§ 636h. Contract to repair.

* The question becomes more complicated when we approach the consideration of agreements to do specific acts at various periods. In a case in New York,[368] where the defendant had covenanted with the plaintiff to keep a certain gate in repair, and to use common care in shutting it when passing and repassing, it was held that if the gate was left unrepaired or open, the defendant would be responsible in an action on the covenant, and that the true measure of damages would be the amount of the plaintiff's loss by the breach proved; that for every second breach a fresh action would lie; that a refusal to rebuild the gate did not amount to a total and final breach of

[362] Cooke *v.* Whorwood, 2 Saund. 337.

[363] Rudder *v.* Price, 1 H. Bl. 547.

[364] Guernsey *v.* Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448, n.; Clark *v.* Jones, 1 Denio (N. Y.), 516, 43 Am. Dec. 706.

[365] Badger *v.* Titcomb, 15 Pick. (Mass.) 409.

[366] *Maine:* Sutherland *v.* Wyer, 67 Me. 64.

Massachusetts: Mullaly *v.* Austin, 97 Mass. 30.

New Hampshire: Lamoreaux *v.* Rolfe, 36 N. H. 33.

Vermont: Parker *v.* McKannon, 76 Vt. 96, 56 Atl. 311.

[367] *Maine:* Fales *v.* Hemenway, 64 Me. 373.

Massachusetts: Parker *v.* Russell, 133 Mass. 74.

[368] Crain *v.* Beach, 2 Barb. 120, and s. c. on appeal, Beach *v.* Crain, 2 N. Y. 86; and see, also, Fish *v.* Folley, 6 Hill (N. Y.), 54.

the covenant, nor could the damages recovered in a suit brought for one breach be presumed to have been given as a compensation for the non-performance of the covenant through all future time, so as to bar further suits.[369] ** In Keith *v.* Hinkston [370] it was held that on breach of a contract to keep a "switch or spur" in good repair, and to furnish cars for transportation, the plaintiff could only recover for the damage already sustained. But it has been held that all the breaches which have actually taken place must be embraced in the first suit; and that even if they are not, a second suit will not lie for them.[371]

§ 636i. To support.

Where a contract has been made to support the plaintiff for life, or a bond given conditioned to furnish the plaintiffs their support during their natural lives, a complete failure to provide for the plaintiff according to the obligation, amounts to a total breach and full and final damages may be recovered.[372] So where the plaintiff was induced to take care of a paralytic old man till his death, by his promise to "provide for her, and give her full and plenty after he was gone," she was allowed to recover such a reasonable sum, ascertained by the annuity tables or otherwise, as would provide her with an annuity which would keep her in her condition of life, relieved from the necessity of work,[373] or in other words, "such an amount as, with its interest, will give a sufficient support for life, leaving nothing at death." [374] In analogy with contracts to provide for support, it has been held in Alabama that a refusal by a college to permit the plaintiff to enjoy the benefit of a permanent

[369] *Acc.*, Phelps *v.* New Haven & N. Co., 43 Conn. 453. But *contra*, Erie & P. R. R. *v.* Johnson, 101 Pa. 555.

[370] 9 Bush (Ky.), 283.

[371] Bristowe *v.* Fairclough, 1 M. & G. 143; Pinney *v.* Barnes, 17 Conn. 420; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207.

[372] *Maine:* Philbrook *v.* Burgess, 52 Me. 271, 83 Am. Dec. 509; Fales *v.* Hemenway, 64 Me. 373.

Massachusetts: Canada *v.* Canada, 6 Cush. 15; Amos *v.* Oakley, 131 Mass. 413; Parker *v.* Russell, 133 Mass. 74.

New York: Schell *v.* Plumb, 55 N. Y. 592; Shaffer *v.* Lee, 8 Barb. 413; Empie *v.* Empie, 35 App. Div. 51, 54 N. Y. Supp. 402.

Oregon: Tippin *v.* Ward, 5 Ore. 450.

But unless the defendant's conduct was such as to put an end entirely to the contract, recovery can be had only for a partial breach. Fay *v.* Guynon, 131 Mass. 31.

[373] Thompson *v.* Stevens, 71 Pa. 161.

[374] Freeman *v.* Fogg, 82 Me. 408.

scholarship which he had purchased, by denying him the right to appoint a pupil, is a total breach.[375]

§ 636j. Fluctuations in value during contract: Masterton v. The Mayor.

There is another class of cases, namely, where the contract covers a long space of time, and during that period the services and commodities which enter into the cost of performance have fluctuated in value. Thus in a case in New York, which we have already had occasion to notice in reference to another branch of this subject,[376] the plaintiff, in 1836, agreed to furnish and deliver marble to build a city hall, at successive periods in five successive years. In 1837 the defendants refused to receive any more. The suit was brought before, but the trial did not take place till after the period for performance had elapsed, and it was shown that the difference between the cost of the marble and the contract price, which was the measure of damages, had fluctuated considerably in the five years. On this state of facts the circuit judge charged, that "in fixing damages to be allowed the plaintiffs, the jury were to take things as they were *at the time the work was suspended*, and not allow for any increased benefit they would have received from the subsequent fall of wages or subsequent circumstances." And of this opinion was the majority of the court, on a motion for a new trial. Nelson, C. J., who delivered the leading opinion, said:

"It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years—of which about one year and a half only had expired at the time of the suspension—the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim; but in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the op-

[375] Howard College *v.* Turner, 71 Ala. 429, 46 Am. Rep. 326.

[376] Masterton *v.* Mayor of Brooklyn, 7 Hill (N. Y.), 61, 42 Am. Dec. 38.

posite party elects to consider it in that light, *the market price on the day of the breach* is to govern in the assessment of damages. *In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance.* The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present as in actions predicated upon a failure to perform at the day."

And Bronson, J., said:

"There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed, and this makes the question upon which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule; it will best preserve the analogies of the law, and will be as likely as any other to do substantial justice to both parties."

Beardsley, J., however, dissented on this point, saying:

"The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants; but this the plaintiffs were not bound to do. There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836, and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect

there is no need of resorting to conjecture; for all the data necessary to form a correct estimate of the entire expense of executing the contract can now be furnished by witnesses.

"If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages, although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily, at which prices are to be ascertained and estimated, and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market in respect to prices is now susceptible of explicit and intelligible proof; and where that is so, it seems to me unsuitable to adopt an arbitrary period, especially as the estimate of damages must, in any event. be somewhat conjectural." [377]

So in a case in Alabama,[378] where the plaintiff had agreed to let the defendants have all the pine timber on his lands, suitable for good lumber, the defendants to saw it into lumber, sell it as soon as they could, and pay the plaintiff one-fifth of the gross proceeds of the lumber sold and collected by them, it was held that for the breach of this contract by the defendant in not sawing all the lumber, but one action lay, in which, notwithstanding the period allowed for the performance had not expired at the time of the breach, he was entitled to the damages resulting from the prospective as well as the actual failure, to be assessed on the basis of value at the time of the breach.

In Shaffer *v.* Lee,[379] Hand, J., said of the case of Masterton *v.*

[377] The rule laid down by the majority of the court was followed in New York & H. R. R. *v.* Story, 6 Barb. (N. Y.) 419.

[378] Fail *v.* McRee, 36 Ala. 61.

[379] 8 Barb. (N. Y.) 412.

The Mayor, "As I understand the opinions delivered, all the judges considered the plaintiff entitled to recover entire and final damages for the non-fulfilment." And it is to be noticed that this was the only question actually before the court for decision. That part of the charge in the trial court quoted above was favorable to the defendant, and as the plaintiff did not except to it, the question of its correctness, upon which, as we have seen, the judges differed in opinion, was not directly involved in the decision.

The dictum of the majority of the judges in Masterton *v.* The Mayor has been followed in a few States only,[380] and appears not to represent the present law in New York.[381]

§ 636k. Goodrich v. Hubbard.

The contract may be sued upon either after the time for its performance has expired, or while it is still running. In the case just cited the plaintiff sued at once on breach. In a Michigan case [382] a logging contract provided that the logger should haul the logs during the winter next ensuing if the weather should permit; if the weather should be unfavorable, the contract was to be continued to another winter. Owing to the weather, the logger postponed what remained undone the first winter; but the defendants prevented complete performance by removing the logs before the next winter. In the ensuing winter the logger could have delivered the logs for half the contract rate, being much less than it would have cost him the first winter. It was held that he was entitled to recover the difference between the contract price and what it would have cost him to deliver the logs during the second winter.[383] In this Michigan case the

[380] *Alabama:* Fail *v.* McRee, 36 Ala. 61, *supra.*

Florida: Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Illinois: James H. Rice Co. *v.* Penn P. G. Co., 88 Ill. App. 407.

Louisiana: Seaton *v.* Second Municipality, 3 La. Ann. 44.

The question was left open in *Nebraska:* Nebraska Bridge S. & L. Co. *v.* Owen Conway & Sons, 127 Ia. 237, 103 N. W. 122.

[381] Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982; St. Regis P. Co. *v.* Santa Clara L. Co., 173 N. Y. 149, 65 N. E. 967.

[382] Goodrich *v.* Hubbard, 51 Mich. 62, 16 N. W. 232.

[383] *Acc.*, Leo Austrian & Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 266.

point at issue was whether the plaintiff's recovery must be the contract price, less the cost of performance, during the first or the second winter, because although the time of performance was the second winter, the time when the defendants prevented performance was earlier. The Supreme Court of Michigan said: [384]

"It is objected that the profits must be ascertained on the day of the breach; that to attempt to ascertain the damages in any other way would be speculative, uncertain, and conjectural. The case of Masterton *v.* Mayor of Brooklyn is cited as authority, but an examination of that case shows that the court made the market price on the day of the breach of the contract to govern in assessment of damages to depend upon the opposite party having elected to consider the contract broken before the arrival of the time for full performance. The facts of this case were somewhat exceptional, there being a claim for a breach of a contract running through a period of five years, of which about one year and a half only had expired, the court and jury having no certain data upon which to estimate the profits for the remaining three years and a half.[385] That case is not applicable here, where the election of the plaintiff to consider the contract broken before arrival of the time for its full performance does not appear; and upon the facts found it does appear that there are certain data for estimating the damages found. The consideration of profits cannot be separated in this case from the circumstances under which the work was to be done, and the prevention of which constitutes the breach making the defendants liable.

"There is no element of uncertainty regarding the profits the plaintiff would have realized from the performance of the contract, and which must govern in the estimate of damages. There are no contingencies modifying or taking the case out of the rule laid down by this court in the case of Burrell *v.* New York & Saginaw Solar Salt Co." [386]

§ 6361. Probable future expense of performing.

In a case in Vermont a similar rule was laid down. The de-

[384] 51 Mich. 62, 70, per Sherwood, J.

[385] This seems to be a mistake. See statement of the case above.

[386] 14 Mich. 34.

fendants, a bridge company, had, in September, 1830, agreed with the plaintiffs to keep a bridge in repair for twelve years, on the plaintiffs paying twenty-five dollars every year. The plaintiffs paid the annual sum until 1838, when the defendants ceased to repair; and the judge charged at the trial, that the jury "should limit their inquiries to the time when both the parties ceased in fact to act under the contract." But on motion for a new trial the court said: "The rule of damages in this case should have been, to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years." [387]

In Roper *v.* Johnson [388] the defendant agreed to deliver coal to the plaintiff for a certain price during the months of May, June, July, and August. In June, the defendants refused to deliver any more coal; suit was brought in July, and the trial took place in August, before the expiration of the time for performance. The price of coal was continually rising. A verdict was found, based on the actual price of coal to the time of trial, and a *probable further rise in price during the remainder of August.* This verdict was sustained by the Court of Common Pleas. Brett, J., said: "When you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach." The defendant might, however, reduce these damages by showing that the plaintiff should have secured another contract at the time of breach.

§ 636m. General conclusions.

It will be seen from the foregoing that two extreme rules have been laid down: one, that in calculating the cost of performance, the market rates at the time of breach are to govern; the other, that the market rates down to the time of trial, and even the *probable future course of the market* (if the time of performance extends beyond the time of trial), may be con-

[387] Royalton *v.* R. & W. Turnpike Co., 14 Vt. 311. *Acc.*, McCall *v.* Icks, 107 Wis. 232, 83 N. W. 300.

[388] L. R. 8 C. P. 167; *acc.*, Brown *v.* Muller, L. R. 7 Ex. 319, 323, per Kelley, C. B.; Leigh *v.* Patterson, 8 Taunt. 540.

sidered. Under the first rule, the recovery would not be affected by the time selected for the trial; under the second rule, if the trial took place in advance of the time fixed for performance the measure of recovery would be dependent partly on rates existing at the time of the breach and partly upon conjecture as to the future course of the market. If the trial were postponed, for the conjectural rates would be substituted the now ascertained market rates. The case may easily be supposed of a new trial for error, in which second trial it will appear that the conjectural rates allowed in the first trial were not justified by the actual course of the market. Of course in all such cases, the *measure of damages* is always the same; but the actual recovery, as we have seen, may be more or less, according as the time of trial is earlier or later. But the allowance of conjectural rates, or the consideration of the probable future course of the market, seems to be in conflict with all the rules requiring certainty of proof. It would be almost impossible to foretell, with that degree of certainty required of a plaintiff in proving the amount of his damages, that the price of performance would decrease by any certain amount during the period fixed for performance; and, on the other hand, after the plaintiff had shown what the cost of performance would be, reckoned according to circumstances at the time of trial, it would be as difficult for the defendant to show that a change would take place. The principle requiring certainty of proof would lead to the rule that damages on account of all work to be done after *the date of the trial* should in the ordinary case be estimated according to the state of affairs *at the time of trial.* If, however, the period fixed for the complete performance of the contract has passed before the trial, there is no uncertainty as to the actual cost of performance, as Beardsley, J., points out in his opinion in the case of Masterton *v.* The Mayor. The contract price and the exact cost of performance can be shown, and the difference between them is the measure of damages. This is not affected by the fact that at the time of breach the amount could not be certainly known. In many cases circumstances occurring after the injury determine the amount of damages. The opinion of the majority of the court in Masterton *v.* The

Mayor in this respect seems to have been based upon the old notion, now abandoned, that no circumstances occurring after the injury can be resorted to for aid in fixing the amount of loss.[389]

Perhaps, on principle, a distinction should be made among agreements of this class. If the contract is, in its nature, capable of division, as to deliver the crops of a farm for several successive years, and if the periods have arrived before suit brought, there seems no reason why a separate action may not be brought for every refusal to perform, nor why the damages should not be estimated as at every period fixed for performance.[390] But where the contract is intrinsically indivisible, as in the case of a building contract, for instance, one refusal may properly be considered as an absolute breach; and then we have presented the question involved in Masterton *v.* The Mayor. If the periods specified in the contract have not arrived before the trial of the cause, any effort to fix the rights of the parties at those various times must be mere matter of conjecture; and *probable expense* is neither a precise nor a safe direction for a jury.

§ 636n. Mutual covenants.

The question whether mutual covenants in a contract are dependent or independent also involves the entirety of the contract. In a recent case in the United States Circuit Court of Appeals [391] the question arose upon the construction of a lease by a railroad company. By this contract (renewable forever) the company leased to H. a tract of land near the

[389] § 85.

[390] Brown *v.* Muller, L. R. 7 Ex. 319. In England, it has been several times held in chancery, in regard to future agreements, that the difficulty of arriving at any true rule of damages is a good ground for a decree for specific performance. Buxton *v.* Lister, 3 Atk. 383, and Taylor *v.* Neville, cited therein; Ball *v.* Coggs, 1 Bro. Parl. Cas. 140; and Adderley *v.* Dixon, 1 Sim. & Stuart, 607. In this last case the vice-chancellor said: "The profit upon the contract being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. Damages might be no complete remedy, being to be calculated merely by conjecture." This language seems to imply that, at law, the whole period of the contract would be inquired into, on the principle of the Vermont decision.

[391] Union Pacific Ry. *v.* Travelers' Ins. Co., 83 Fed. 676, 49 U. S. App. 752, 28 C. C. A. 1.

center of a town, H. agreeing to construct upon it a hotel and station, the company agreeing to stop all passenger trains passing at reasonable hours, a sufficient time to allow the passengers to take their meals. It also covenanted not to permit the use of its property to injure the business of the hotel. After a time the trains ceased to stop sufficiently long to comply with the contract. The value of the improvements put upon the leased premises was $40,000 and the court below held that the measure of damages caused by the breach was the value of these improvements. On appeal it was agreed that this was the proper measure on the grounds that the covenants of the lessor to stop its trains for meals, and not to permit the use of its property to injure the business of the hotel, and the covenant of the lessor to keep a first-class hotel were mutually dependent covenants, each of which went to the whole consideration; second, that the continuing breach by the lessor gave the lessee the right to recover damages as for a total breach of the entire contract; and, third, that the lessee was entitled to recover whatever it had expended in preparing to fulfil its part of the contract—which was alleged to be more than the estimated value of the hotel. But the Circuit Court of Appeals ordered a new trial, holding that the true measure of damages was the difference between what the lessee earned after breach, and what it would have earned if the contract had been fully performed by the railroad company.

In such cases the test is whether the covenants go to the whole consideration on both sides. If they do, then "they are mutual conditions," "the one precedent to the other." If not, the damages for any breach may be separately assessed.[392] In the first case, the injured party may treat the contract as broken in its entirety, and recover damages for a total breach.[393]

But in the second case, the contract is still binding upon

[392] *United States:* Lawler *v.* Bangs, 2 Wall. 728, 736, 17 L. ed. 768.

England: Boone *v.* Eyric, 1 H. Bl. 273; Ritchie *v.* Anderson, 10 East. 295; Stavers *v.* Cushing, 3 Bing. N. C. 355.

[393] *Illinois:* Leopold *v.* Salkey, 89 Ill. 412, 31 Am. Rep. 93, *n.*

Iowa: Richmond *v.* The D. & S. C. R. R., 40 Ia., 264 275.

Massachusetts: Parker *v.* Russell, 133 Mass. 74.

Michigan: Grand R. & B. C. R. R. *v.* Van Dusen, 29 Mich. 431.

the injured party, and he can only recover his actual damages, the *damnum emergens*, or the *lucrum cessans*.[394] It should be observed, however, that rules for determining whether covenants are dependent or independent "are merely aids in ascertaining the intention of the minds of those who execute the instruments. Often the intention is so clear that rules are of no service."

[394] *United States:* Central A. Co. *v.* Buchanan, 73 Fed. 1006, 43 U. S. App. 265, 275, 20 C. C. A. 33.

Missouri: Butler *v.* Manny, 52 Mo. 497, 506; Turner *v.* Mellier, 59 Mo. 526, 536.

New York: Pepper *v.* Haight, 20 Barb. 429, 440.

Pennsylvania: Obermyer *v.* Nichols, 6 Binney, 159, 164.

England: Pordage *v.* Cole, 1 Saund. 320; Campbell *v.* Jones, 6 T. R. 570, 573; Surplice *v.* Farnsworth, 7 Man. & Gr. 576, 584.

CHAPTER XXVIII

BREACH OF PROMISE OF MARRIAGE

§ 637. Exceptional nature of the action.
637a. Exemplary damages.
638. Loss of marriage.
638a. Injury to affections.
638b. Mental suffering.
638c. Consequential damages.
639. Aggravation. Seduction under promise of marriage.
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640a. Plea of justification interposed in bad faith.
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§ 637. Exceptional nature of the action.

*The action for breach of promise of marriage, as has been already said, though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage.[1] From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,[2]

[1] *Arkansas:* Collins *v.* Mack, 31 Ark. 684.

Maine: Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547; Tyler *v.* Salley, 82 Me. 128.

Michigan: Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

Missouri: Wilbur *v.* Johnson, 58 Mo. 600.

New York: Wells *v.* Padgett, 8 Barb. 323.

North Carolina: Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

Texas: Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

[2] *Georgia:* Parker *v.* Forehand, 99 Ga. 743, 28 S. E. 400.

Illinois: Fidler *v.* McKinley, 21 Ill. 308.

Iowa: Rine *v.* Rater, 108 Ia. 61, 78 N. W. 835.

Kansas: Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Maine: Tobin *v.* Shaw, 45 Me. 331.

Missouri: Green *v.* Spencer, 3 Mo.

subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand.[3] ** "Damages in this action," said Mr. Justice E. D. Smith, in a case in the New York Court of Appeals, "have never been limited to the simple rule governing actions upon simple contracts for the payment of money." [4] The injury is accompanied by circumstances affording no definite standard by which the amount lost can be measured, and from the necessity of the case the jury must be left to

318, 26 Am. Dec. 672; Hill *v.* Maupin, 3 Mo. 323.

Nebraska: Schreckengast *v.* Ealy, 16 Neb. 510, 20 N. W. 853.

New Jersey: Coryell *v.* Colbaugh, 1 N. J. L. 77, 1 Am. Dec. 192; Stout *v.* Prall, 1 N. J. L. 79, 1 Am. Dec. 193.

New York: Southard *v.* Rexford, 6 Cow. 254.

Rhode Island: Drury *v.* Merrill, 20 R. I. 2, 36 Atl. 835.

South Carolina: Torre *v.* Summers, 2 Nott & M'C. 267, 10 Am. Dec. 597.

Wisconsin: Olson *v.* Solverson, 71 Wis. 663, 38 N. W. 329.

[3] *Connecticut:* Hattin *v.* Chapman, 46 Conn. 607 (a very strong case).

Illinois: Richmond *v.* Roberts, 98 Ill. 472.

Indiana: Eve *v.* Rodgers, 12 Ind. App. 623, 40 N. E. 25.

In the following cases the court refused to set aside a verdict: Geiger *v.* Payne, 102 Iowa, 581, 69 N. W. 554 (verdict for $16,000; circumstances of aggravation, defendant worth from $50,000 to $75,000); Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132 (verdict for $10,000; circumstances of aggravation); McKenzie *v.* Gray, 143 Ia. 112, 120 N. W. 71 (verdict for $8,000; breach after long engagement, defendant worth $75,000); Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908 (verdict for $7,500; circumstances of aggravation); Musselman *v.* Barker, 26 Neb. 737, 42 N. W. 759 (verdict for $7,000; circumstances of aggravation); Fisher *v.* Kenyon, 56 Wash. 8, 104 Pac. 1127 (verdict for $6,000); Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367 (verdict for $5,000; circumstances of aggravation); Douglas *v.* Gausman, 68 Ill. 170 (verdict for $3,600; defendant worth $25,000); Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914 (verdict for $2,800; defendant worth less than $10,000, no special aggravating circumstances); Mainz *v.* Lederer, 21 R. I. 370, 374, 43 Atl. 876 (verdict for $1,200; circumstances of aggravation, defendant worth $75,000).

In the following cases the court set aside a verdict: McCarty *v.* Heryford, 125 Fed. 46 (verdict for $22,500; defendant worth $50,000, circumstances of mitigation); Johnson *v.* Levy, 122 La. 118, 47 So. 422 (verdict for $20,000); Kolsch *v.* Jewell, 21 App. Div. 581, 48 N. Y. Supp. 527 (verdict for $7,500; plaintiff sewing machine teacher, defendant received salary of $30 a week; circumstances of aggravation; verdict cut down to $2,500); Kellett *v.* Robie, 99 Wis. 303, 47 N. W. 781 (verdict for $3,500; defendant worth $6,000, no circumstances of aggravation).

In Hooker *v.* Phillippe, 26 Ind. App. 501, 60 N. E. 167, a verdict for one cent damages was set aside as inadequate.

[4] Thorn *v.* Knapp, 42 N. Y. 474, 483, 1 Am. Rep. 561.

exercise a large discretion in arriving at the amount. The verdict will not be interfered with unless it is obviously and grossly excessive, although in a sufficiently flagrant case the court may set the verdict aside.[5]

§ 637a. Exemplary damages.

In jurisdictions in which exemplary damages are allowed, it is almost universally agreed that exemplary damages may be allowed in actions for breach of promise of marriage where the proper circumstances are shown to justify such damages.[6] In a few States, however, the courts appear to refuse to allow exemplary damages.[7] As has been seen, in no other action for breach of contract can such damages be allowed; and if the form of action be regarded rather than the substance, no such damages could be allowed in this case. In every case, of course, a proper foundation must be laid for the recovery of exemplary damages, or the recovery will be limited to compensatory damages.[8]

[5] *Connecticut:* Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

Michigan: Hahiat *v.* Codde, 106 Mich. 387, 6 N. W. 194.

Minnesota: Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10.

Tennessee: Goodall *v.* Thurman, 1 Head, 209.

Wisconsin: Olson *v.* Solverson, 71 Wis. 663, 38 N. W. 329.

England: Gough *v.* Farr, 1 Y. & J. 477.

[6] *California:* Moore *v.* Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248 (*semble*).

Illinois: Jacoby *v.* Stark, 205 Ill. 34, 68 N. E. 557; Churan *v.* Sebasta, 131 Ill. App. 330.

Indiana: Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 725.

Michigan: McPherson *v.* Ryan, 59 Mich. 33; Roberts *v.* Druillard, 123 Mich. 286, 82 N. W. 49.

Minnesota: Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

New Jersey: Coryell *v.* Colbaugh, Coxe (1 N. J. L.), 77.

New York: Johnson *v.* Jenkins, 24 N. Y. 252; Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, 21 Am. St. Rep. 736; Wolters *v.* Schultz, 1 Misc. 196, 21 N. Y. Supp. 768; Jacobs *v.* Sire, 4 Misc. 398, 23 N. Y. Supp. 1063; Kerns *v.* Hagenbuehle, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367.

Ohio: Duvall *v.* Fuhrman, 3 Ohio C. Ct. 305, 2 Oh. Circ. Dec. 174.

Oregon: Kelley *v.* Highfield, 15 Ore. 277, 14 Pac. 744.

Pennsylvania: Baldy *v.* Stratton, 11 Pa. 316.

Texas: Clark *v.* Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

[7] Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.

In States where no exemplary damages are allowed in any case, the action for breach of promise cannot constitute an exception: Harrison *v.* Swift, 13 All. (Mass.) 144.

[8] *California:* Moore *v.* Hopkins, 83

§ 638. Loss of marriage.

In estimating compensatory damages for breach of promise of marriage the jury may allow compensation for loss of the advantages of the marriage; the reasonable expectation of sharing in the husband's wealth, the permanent home and advantageous establishment, and the social standing which might follow the marriage.[9] For the purpose of properly estimating the advantages of the proposed marriage it is admissible to show the pecuniary position of the defendant at the time of the breach of the contract.[10] This can be done by proving the de-

Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

Illinois: LaPorte *v.* Wallace, 89 Ill. App. 517.

[9] *Connecticut:* Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

Illinois: Jacoby *v.* Stark, 205 Ill. 34, 68 N. E. 557.

Iowa: Royal *v.* Smith, 40 Ia. 615; Vierling *v.* Binder, 113 Ia. 337, 85 N. W. 621; McKenzie *v.* Gray, 143 Ia. 112, 120 N. W. 71; Lauer *v.* Banning, 131 N. W. 783.

Kansas: Kennedy *v.* Rogers, 2 Kan. App. 764, 44 Pac. 47.

Kentucky: Grubbs *v.* Pence, 24 Ky. L. Rep. 2183, 73 S. W. 785.

Maine: Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443.

Massachusetts: Coolidge *v.* Neat, 129 Mass. 146.

Michigan: Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242; Rutter *v.* Collins, 103 Mich. 143, 62 N. W. 267; Spencer *v.* Simmons, 160 Mich. 292, 125 N. W. 9.

Minnesota: Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

Missouri: Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.

Montana: Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

Nebraska: Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

New York: Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, 21 Am. St. Rep. 736.

North Carolina: Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

Rhode Island: Perkins *v.* Hersey, 1 R. I. 493.

Tennessee: Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914.

England: James *v.* Biddington, 6 C. & P. 589.

[10] *Arkansas:* Collins *v.* Mack, 31 Ark. 684.

California: Reed *v.* Clark, 47 Cal. 194.

Illinois: Douglas *v.* Gausman, 68 Ill. 170; Richmond *v.* Roberts, 98 Ill. 472.

Indiana: Hunter *v.* Hatfield, 68 Ind. 416.

Iowa: Holloway *v.* Griffith, 32 Ia. 409, 7 Am. Rep. 208; McKenzie *v.* Gray, 143 Ia. 112, 120 N. W. 71.

Maine: Lawrence *v.* Cooke, 56 Me. 187.

Michigan: Miller *v.* Rosier, 31 Mich. 475; Bennett *v.* Bean, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; McPherson *v.* Ryan, 59 Mich. 33, 26 N. W. 321.

Minnesota: Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 624.

Missouri: Casey *v.* Gill, 154 Mo. 181, 55 S. W. 219.

New York: Kniffen *v.* McConnell, 30 N. Y. 285; Crosier *v.* Craig, 47 Hun, 83; Totten *v.* Read, 16 Daly, 282, 10 N. Y. Supp. 318, 32 N. Y. St. 46.

fendant's wealth by reputation [11] especially as this directly affects the social position which the plaintiff would have gained by the marriage.[12] In some States it is held not allowable to prove his ownership of any particular property, unless the marriage would have given the wife a legal interest in such property, as might happen in case of real estate in which she would get by the marriage an inchoate right of dower; [13] but in most States the actual value of his property may be shown.[14] No evidence of property coming to the defendant at a time subsequent to the breach is allowed to be given,[15] but evidence of facts happening after the breach which fix the value of the property accruing before the breach may be shown.[16] The social standing of the defendant may be put in evidence, to show the loss of social standing suffered by the plaintiff through the breach.[17]

North Carolina: Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

Ohio. Stribley *v.* Welz, 1 Ohio Dec. 621, 624, 8 Ohio C. Ct. 571.

Texas: Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

West Virginia: Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

Wisconsin: Olson *v.* Solveson, 71 Wis. 663, 38 N. W. 329; Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132.

England: James *v.* Biddington, 6 C. & P. 589.

[11] *Nebraska:* Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

New Jersey: Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

New York: Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, 21 Am. St. Rep. 736.

[12] Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, 21 Am. St. Rep. 736.

[13] *New Jersey:* Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

New York: Kniffen *v.* McConnell, 30 N. Y. 285; Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, 21 Am. St. Rep. 736.

See Kerfoot *v.* Marsden, 2 F. & F. 160.

[14] *Illinois:* Sprague *v.* Craig, 51 Ill. 288; Douglas *v.* Gausman, 68 Ill. 170.

Iowa: Rime *v.* Rater, 108 Ia. 61, 78 N. W. 835; Vierling *v.* Binder, 113 Ia. 337, 85 N. W. 621.

Vermont: Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726.

[15] In Vierling *v.* Binder, 113 Ia. 337, 85 N. W. 621, it seems to have been assumed that the plaintiff could not claim damages based on property acquired after the promise was made; and see to the same effect Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

[16] *Vermont:* Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726.

Washington: Fisher *v.* Kenyon, 56 Wash. 8, 104 Pac. 1127 (defendant's property at time of trial, a few months after breach, admissible to prove property at time of breach).

[17] Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

Evidence of the wealth of defendant's wife [18] or parent [19] cannot be shown; nor can he introduce evidence of his own poverty.[20]

§ 638a. Injury to affections.

The plaintiff is also allowed to recover damages for her wounded affections and loss of the comfort and companionship of a husband.[21] For the purpose of estimating loss of this sort evidence may be introduced of the existence of lack of feeling of affection for the defendant,[22] and of the plaintiff's grief at the termination of the engagement.[23] Compensation cannot be recovered for injury to the feelings of plaintiff's family and friends.[24]

§ 638b. Mental suffering.

The plaintiff may also recover compensation for mortification and shame caused by the termination of the engagement, distress of mind, disgrace and loss of standing in the community.[25] For the purpose of estimating this loss she may show the

[18] Crandall *v.* Quin, 51 N. Y. Super. Ct. 276.

[19] *Michigan:* Miller *v.* Rosca, 31 Mich. 475; Spencer *v.* Simmons, 160 Mich. 292, 125 N. W. 9.

New York: Aldis *v.* Stewart, 4 Misc. 389, 24 N. Y. Supp. 329, 53 N. Y. St. 518.

[20] Wilbur *v.* Johnson, 58 Mo. 600.

[21] *Georgia:* Parker *v.* Forehand, 99 Ga. 743, 28 S. E. 400.

Hawaii: Ayers *v.* Mahuka, 9 Haw. 377.

Iowa: Robinson *v.* Craver, 88 Ia. 381, 55 N. W. 492.

Kansas: Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Louisiana: Johnson *v.* Levy, 118 La. 447, 43 So. 46.

Maine: Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443.

Massachusetts: Coolidge *v.* Neat, 129 Mass. 146.

Michigan: Spencer *v.* Simmons, 160 Mich. 292, 125 N. W. 9.

Missouri: Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282.

Montana: Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

New York: Wolters *v.* Schultz, 1 Misc. 196, 21 N. Y. Supp. 768.

Rhode Island: Perkins *v.* Hersey, 1 R. I. 493.

Tennessee: Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914.

[22] *Iowa:* Robinson *v.* Craver, 88 Ia. 381, 55 N. W. 492 (*semble*).

Michigan: Miller *v.* Rosca, 31 Mich. 475.

Montana: Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

[23] *Michigan:* Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

Texas: Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

[24] Bell *v.* Giberson, 30 N. Br. 10.

[25] *Georgia:* Parker *v.* Forehand, 99

length of time during which the engagement had subsisted,[26] and that knowledge of the engagement had been communicated to her friends.[27]

§ 638c. Consequential damages.

In addition to these elements of compensation the plaintiff may recover compensation for any damages suffered as a consequence of the breach of contract. For instance, the plaintiff may recover on the actual outlay in preparation for the marriage.[28] The plaintiff, if a woman, may also show that the engagement subsisted for so long a time that other suitors were discouraged from approaching her with offers of marriage and that she has therefore lost the opportunity of becoming engaged to others.[29] The fact, however, that at the defendant's solicitation she terminated an engagement with another suitor cannot be shown.[30] It has been held that injury to health caused by manual labor which, as defendant knew would be the case, plaintiff was compelled to undergo in order to support herself after the breach was chargeable to the defendant.[31]

Ga. 743, 28 S. E. 400; Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318.

Hawaii: Ayers *v.* Mahuka, 9 Haw. 377.

Iowa: Royal *v.* Smith, 40 Iowa, 615; Robinson *v.* Craver, 88 Iowa, 381, 55 N. W. 492; Rime *v.* Rater, 108 Iowa, 61, 78 N. W. 835.

Kansas: Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Kentucky: Grubbs *v.* Pence, 24 Ky. L. Rep. 2183, 73 S. W. 785.

Maine: Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443; Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107.

Massachusetts: Coolidge *v.* Neat, 129 Mass. 146.

Michigan: Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242; Rutter *v.* Collins, 103 Mich. 143, 62 N. W. 267.

Missouri: Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.

New York: Wolters *v.* Schultz, 1 Misc. 196, 21 N. Y. Supp. 768.

Tennessee: Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914.

[26] Olmstead *v.* Hoy, 112 Ia. 349, 83 N. W. 1056.

[27] Reed *v.* Clark, 47 Cal. 194; Liebrandt *v.* Sorg, 133 Cal. 571, 65 Pac. 1098.

[28] *Illinois:* Dunlap *v.* Clark, 25 Ill. App. 573.

Iowa: Olmstead *v.* Hoy, 112 Ia. 349, 83 N. W. 1056.

Michigan: Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242.

New York: Wolters *v.* Schultz, 1 Misc. 196, 21 N. Y. Supp. 768.

Texas: Glasscock *v.* Shell, 57 Tex. 215.

[29] Olmstead *v.* Hoy, 112 Iowa, 349, 83 N. W. 1056.

[30] Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467, 83 Am. St. Rep. 366.

[31] Duff *v.* Judson, 160 Mich. 386, 125 N. W. 371.

§ 639. Aggravation. Seduction under promise of marriage.

Circumstances which show that the injury was particularly serious may be shown in aggravation of damages. Thus it may be shown, in order to increase the damages, that the plaintiff was seduced by the defendant under promise of marriage [32]

[32] *Arkansas:* Collins *v.* Mack, 31 Ark. 684.

Connecticut: Hattin *v.* Chapman, 46 Conn. 607.

Georgia: Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318.

Illinois: Tubbs *v.* Van Kleek, 12 Ill. 446; Burnett *v.* Simpkins, 24 Ill. 264; Poehlmann *v.* Kertz, 105 Ill. App. 249; Churan *v.* Sebasta, 131 Ill. App. 330.

Indiana: Whalen *v.* Layman, 2 Blackf. 194, 18 Am. Dec. 157; King *v.* Kersey, 2 Ind. 402.

Indian Territory: Davis *v.* Pryor, 3 Ind. Ty. 396, 58 S. W. 660.

Iowa: Geiger *v.* Payne, 102 Ia. 581, 69 N. W. 554; Lauer *v.* Banning, 131 N. W. 783.

Louisiana: Smith *v.* Braun, 37 La. Ann. 225; Johnson *v.* Levy, 122 La. 118, 47 So. 422.

Maine: Tyler *v.* Salley, 82 Me. 128.

Maryland: Sauer *v.* Schulenberg, 33 Md. 288, 3 Am. Rep. 174.

Massachusetts: Paul *v.* Frazier, 3 Mass. 71, 3 Am. Dec. 95; Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

Michigan: Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

Minnesota: Schmidt *v.* Dunham, 46 Minn. 227, 49 N. W. 126.

Missouri: Green *v.* Spencer, 3 Mo. 318, 26 Am. Dec. 672; Hill *v.* Maupin, 3 Mo. 323, 26 Am. Dec. 672; Roper *v.* Clay, 18 Mo. 383; Wilbur *v.* Johnson, 58 Mo. 600; Bird *v.* Thompson, 96 Mo. 424; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Clemons *v.* Seba, 131 Mo. App. 378, 111 S. W. 522.

Nebraska: Musselman *v.* Barker, 26 Neb. 737, 42 N. W. 759.

New Jersey: Coil *v.* Wallace, 24 N. J. L. 291.

New York: Kniffen *v.* McConnell, 30 N. Y. 285; Wells *v.* Padgett, 8 Barb. 323; Jennette *v.* Sullivan, 63 Hun, 361, 18 N. Y. Supp. 266, 43 N. Y. St. 647; Kolseh *v.* Jewell, 21 App. Div. 581, 48 N. Y. Supp. 527.

Ohio: Matthews *v.* Cribbett, 11 Oh. St. 330.

Oregon: Osmun *v.* Winters, 25 Ore. 260, 35 Pac. 250.

Tennessee: Conn *v.* Wilson, 2 Overt. 233, 5 Am. Dec. 663; Goodal *v.* Thurman, 1 Head, 209; Williams *v.* Hollingsworth, 6 Baxter, 12; Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126.

Texas: Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

West Virginia: McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; Dent *v.* Pickens, 34 W. Va 240, 12 S. E. 698, 26 Am. St. Rep. 921.

Wisconsin: Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

England: Berry *v.* DaCosta, L. R. 1 C. P. 331; Millington *v.* Loring, 6 Q. B. Div. 190.

Canada: Bell *v.* Giberson, 30 N. Br. 10.

The rule is otherwise in *Pennsylvania*, on the ground that there is a separate action for the seduction, at suit of the father. Weaver *v.* Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Baldy *v.* Stratton, 11 Pa. 316.

Burks *v.* Shain, 2 Bibb (Ky.), 341, 5 Am. Dec. 616, is often cited as a decision that seduction cannot be shown in aggravation. In that case, however, it was pointed out that several special circumstances prevented such use of the evidence; the father had obtained damages for the seduction, the seduction was not

and that she was delivered of a bastard child.[33] Such seduction must be alleged in the pleadings.[34] It is not the mere fact of seduction that aggravates the damages, but seduction which results from the promise.[35] Thus seduction before the promise of marriage cannot be shown; [36] nor can loss of time and medical attendance in giving birth to a child,[37] nor the care and maintenance of the child.[38] Nor can disease supervening on the intercourse be shown.[39]

In an action for breach of promise, it was held by the Supreme Court of Massachusetts, that although it might be true that damages for the seduction, as a distinct ground of action, could not be added to the damages to which the plaintiff was entitled for the breach of the alleged promise, and these damages must be awarded solely for the suffering which resulted from the defendant's refusal to perform his promise, yet that it would not follow that the act of seduction was not to be taken into consideration by the jury. The damages, even under this rule, could not be justly estimated without regarding the increased exposure to mortification and distress to which the

pleaded, and it had taken place before the promise was made.

In *Rhode Island* it was at first held that seduction could not be shown in aggravation. Perkins *v.* Hersey, 1 R. I. 493. This case was overruled and the general rule adopted in Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876. But this case was in turn overruled and the doctrine that seduction cannot be shown in aggravation was restored in Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615.

[33] *Indiana:* Wilds *v.* Bogan, 57 Ind. 453.

Louisiana: Johnson *v.* Levy, 122 La. 118, 47 So. 422.

Minnesota: Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126.

Tennessee: Conn *v.* Wilson, 2 Overt. 233, 5 Am. Dec. 663.

[34] *Indiana:* Cates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 768.

Kentucky: Burks *v.* Shain, 2 Bibb, 341, 5 Am. Dec. 616.

Maine: Tyler *v.* Salley, 82 Me. 128.

West Virginia: Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

Wisconsin: Leavitt *v.* Cutler, 37 Wis. 46.

[35] Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132, and cases cited.

[36] *Alabama:* Espy *v.* Jones, 37 Ala. 379.

Kentucky: Burks *v.* Shain, 2 Bibb, 341, 5 Am. Dec. 616.

[37] Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598, 65 Wis. 487, 27 N. W. 353. See, however, Stiles *v.* Tilford, 10 Wend. (N. Y.) 338.

[38] Wilds *v.* Bogan, 57 Ind. 453.

[39] Churan *v.* Sebasta, 131 Ill. App. 330 (because the disease would equally have resulted from keeping the contract).

Contra, however, Millington *v.* Loring, 6 Q. B. Div. 190.

plaintiff had been exposed by a seduction under a promise of marriage afterwards broken.[40]

§ 639a. Circumstances of the breach.

Any circumstances attending the breach of promise which would tend to increase the plaintiff's damage may be shown in aggravation. Thus circumstances of abruptness and humiliation with which the engagement was broken may be shown to aggravate the damages,[41] and the length of time during which an engagement has subsisted is a proper circumstance for the jury to consider.[42] The jury may take into account the plaintiff's altered social position in consequence of the defendant's misconduct.[43] And for that purpose evidence of the plaintiff's poverty may be shown.[44] The fact that the defendant entered into the contract with a bad motive may be shown in aggravation.[45] Slanderous statements with regard to the plaintiff made by the defendant at or about the time of the breach may also be shown to increase the damages, according to the better view; [46] though in Illinois this is not allowed, because a separate action would lie for the slander.[47]

§ 640. Events after suit brought.

No evidence can generally be given of any fact having a tendency to aggravate the damages, which has occurred after

[40] Sherman *v.* Rawson, 102 Mass. 395. See, to the same purport:
Maryland: Sauer *v.* Schulenberg, 33 Md. 288, 3 Am. Rep. 174.
Michigan: Sheahan *v.* Barry, 27 Mich. 217.
New York: Getzelson *v.* Bernstein, 37 N. Y. Supp. 220.
Wisconsin: Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132.

[41] *Michigan:* McPherson *v.* Ryan, 59 Mich. 33, 26 N. W. 321.
Pennsylvania: Baldy *v.* Stratton, 11 Pa. 316.

[42] Grant *v.* Willey, 101 Mass. 356.

[43] *Nebraska:* Musselman *v.* Barker, 26 Neb. 737, 42 N. W. 759.
England: Berry *v.* Da Costa, L. R. 1 C. P. 331. See Smith *v.* Woodfine, 1 C. B. (N. S.) 660, where the cases are reviewed.

[44] Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

[45] Kaufman *v.* Fye, 99 Tenn. 145, 42 S. W. 25.

[46] *Maine:* Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443.
Missouri: Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282.
New Hampshire: Chesley *v.* Chesley, 10 N. H. 327.
Oregon: Kelley *v.* Highfield, 15 Ore. 290, 14 Pac. 744.

[47] Greenup *v.* Stoker, 7 Ill. 688; Dunlap *v.* Clark, 25 Ill. App. 573.

the commencement of the suit.[48] So it has been held that in an action for breach of promise, an indecent and insulting letter written by defendant to the plaintiff after suit brought cannot be proved.[49]

But in Osmun *v.* Winters [50] an article published under defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, were held admissible and were allowed to be considered in aggravation of damages, on the ground that it tended to show the animus of defendant in refusing to perform the marriage contract, upon like grounds as unproved allegations of unchastity in the pleadings may be considered in aggravation of damages.

§ 640a. Plea of justification interposed in bad faith.

If the defendant sets up in bad faith, or without reasonable grounds for believing that he will be able to establish the truth of it a plea of justification which constitutes an attack on the plaintiff's character, this will be allowed to aggravate the damages.[51] This is held even though the attempt is not made in the formal pleadings, but only in the evidence produced at the trial.[52]

In a few jurisdictions this doctrine appears to be carried so far that the defendant sets up a scandalous justification at his peril; and if he fails to prove it the attempt aggravates the damage, in whatever good faith it was made.[53] In other States, however, this is regarded as unsound, on the ground that it restricts the right of the defendant to interpose a perfectly legal

[48] Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

[49] Greenleaf *v.* McColley, 14 N. H. 303.

[50] 30 Ore. 177, 46 Pac. 780.

[51] *California:* Reed *v.* Clark, 47 Cal. 194.

Indiana: Haymond *v.* Saucer, 84 Ind. 3.

Missouri: Davis *v.* Slagle, 27 Mo. 600; Cole *v.* Holliday, 4 Mo. App. 94.

New York: Kniffen *v.* McConnell, 30 N. Y. 285.

Ohio: Duvall *v.* Fuhrman, 3 Ohio C. Ct. 305, 2 Oh. Cir. Dec. 171.

But see Spencer *v.* Simmons, 160 Mich. 292, 125 N. W. 9.

[52] Kniffen *v.* McConnell, 30 N. Y. 285.

[53] *Colorado:* Fleetwood *v.* Barnett, 11 Col. App. 77, 52 Pac. 293.

New York: Southard *v.* Rexford, 6 Cow. 260; Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561.

Oregon: Osmun *v.* Winters, 30 Ore. 177, 46 Pac. 780.

Tennessee: Kaufman *v.* Fye, 99 Tenn. 145, 167, 42 S. W. 25.

plea; and the justification is allowed to aggravate the damages only where it was interposed in bad faith.[54] An unsuccessful attempt of the defendant to prove that while the plaintiff claimed to be waiting for the defendant to marry her she was trying to marry another man, should not aggravate the damages.[55]

§ 641. Mitigation. Bad character or conduct of plaintiff. Any circumstance tending to diminish the damages which would otherwise be recovered by the plaintiff may be shown in mitigation of damages. Thus it may be shown that the plaintiff's character and reputation for chastity, sobriety, or otherwise is bad.[56] This evidence tends directly to diminish the damages which she claims for loss of reputation and for humiliation and wounded feelings.

* Bad conduct of the plaintiff may be shown either in bar of the action altogether or in mitigation of damages. Dissolute conduct on the part of the woman after the promise (or before if unknown) discharges the contract altogether. *Indecent* conduct *before* the promise, if unknown to the defendant, or *after* the promise, goes in mitigation of damages.[57] ** The plaintiff's

[54] *California:* Powers *v.* Wheatley, 45 Cal. 113; Reed *v.* Clark, 47 Cal. 194; *Illinois:* Fidler *v.* McKinley, 21 Ill. 308; Blackburn *v.* Mann, 85 Ill. 222. *Indiana:* Hunter *v.* Hatfield, 68 Ind. 416. *Iowa:* Denslow *v.* Van Horn, 16 Ia. 476. *Ohio:* White *v.* Thomas, 12 Oh. St. 312, 80 Am. Dec. 347. *Wisconsin:* Leavitt *v.* Cutler, 37 Wis. 46; Albertz *v.* Albertz, 78 Wis. 72, 47 N. W. 95.

[55] Simpson *v.* Black, 27 Wis. 206.

[56] *Connecticut:* Woodward *v.* Bellamy, 2 Root, 354. *Illinois:* Doubet *v.* Kirkman, 15 Ill. App. 622. *Missouri:* Cole *v.* Holliday, 4 Mo. App. 94; Markham *v.* Herrick, 82 Mo. App. 327. *New York:* Johnson *v.* Caulkins, 1 Johns. Cas. 116. *Tennessee:* Williams *v.* Hollingsworth, 6 Baxter, 12. *Canada:* McGregor *v.* McArthur, 5 U. C. C. P. 493.

In Capehart *v.* Carradine, 4 Strobh. (S. C.) 42, it is held that reports of immoral acts of the plaintiff may be proved in mitigation if they are based on good foundation.

In Gross *v.* Hochstim, 130 N. Y. Supp. 315, undesirable traits and objectionable characteristics of the (male) plaintiff were allowed to be shown in mitigation: as that he lived beyond his means, failed to pay his board bill, and pawned the engagement ring given him by defendant.

[57] *Illinois:* Butler *v.* Eschleman, 18 Ill. 44. *Indiana:* Conaway *v.* Shelton, 3 Ind. 334. *Iowa:* Denslow *v.* Van Horn, 16 Iowa, 476.

breach of the criminal law by profanity, is said to go in mitigation; [58] and so does his habit of getting intoxicated.[59]

The fact of a female plaintiff's having had an illegitimate child, if known to the defendant at the time of the promise, is no defense to the action, but goes in mitigation.[60] So in Illinois, the woman's connection with a man other than the defendant, before as well as after the promise, although the engagement was formed or continued by the defendant, with knowledge of the fact, goes in mitigation of the damages, on the ground that an unchaste woman cannot be injured by a breach of the marriage promise to the same extent with a virtuous one.[61] So far, however, as the damages are a pecuniary compensation for the loss of an advantageous match, the measure should not be affected by previous misconduct of the woman which had been forgiven by the defendant. Indeed, a reputable woman's pecuniary loss would perhaps not be so great as that of one whose reputation is tarnished, as it would generally be more easily made good. Perhaps, moreover, as regards other damages, the loss of the opportunity of retrieving her name, and reassuming a position of respectability, is an injury practically equivalent to the keener mortification which a virtuous woman may be thought to sustain from the breach of such a contract. In the case, however, of the continuance of the woman's wrongdoing, if such continuance be without the suitor's knowledge, she is entitled to nothing, and if with his acquiescence, to nom-

Massachusetts: Boynton *v.* Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

Nebraska: Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

New Jersey: Budd *v.* Crea, 6 N. J. L. 370.

New York: Johnson *v.* Caulkins, 1 Johns. Cas. 116, 1 Am. Dec. 102; Willard *v.* Stone, 7 Cow. 22, 17 Am. Dec. 496; Palmer *v.* Andrews, 7 Wend. 142; Kniffen *v.* McConnell, 30 N. Y. 285.

Pennsylvania: Van Storch *v.* Griffen, 71 Pa. 240.

South Carolina: Capehart *v.* Carradine, 4 Strob. 42.

Texas: Clark *v.* Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

Wisconsin: Albertz *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

England: Irving *v.* Greenwood, 1 C. & P. 350.

In Tompkins *v.* Wadley, 3 Thomps. & C. (N. Y.) 424, an unchaste act 27 years before the trial was allowed to be shown in mitigation.

[58] Berry *v.* Bakeman, 44 Me. 164.

[59] Button *v.* McCauley, 5 Abb. Pr. (N. S.) 29, 4 Transcr. App. 447, 1 Abb. Dec. 282.

[60] Denslow *v.* Van Horn, 16 Ia. 476.

[61] Burnett *v.* Simpkins, 24 Ill. 264; *acc.*, Sheahan *v.* Barry, 27 Mich. 217.

inal damages only, both on the ground of her misconduct, and because the loss of a husband who has connived at his wife's shame inflicts no damage.

Incontinence between the plaintiff and the defendant before the promise should not be shown in mitigation of damages.[62] The fact that the plaintiff shot the defendant [63] or abused the defendant's relatives [64] cannot be shown in mitigation.

§ 641a. Feelings of the parties.

The feelings of the plaintiff toward the defendant during the existence of the engagement may be shown, as bearing directly on the compensation for wounded affections; but not her feelings after the breach of the engagement. Thus in Miller *v.* Hayes [65] it was held that declarations made by the plaintiff after the commencement of the suit, to the effect that she would not marry the defendant except for his money, were not admissible in mitigation of damages. But in Miller *v.* Rosier [66] similar declarations, made a few days after the engagement was broken, were admitted, as showing her feelings during the engagement. The fact that the plaintiff had been engaged to another person previous to her promise to the defendant cannot be shown in mitigation.[67]

In the case of Leeds *v.* Cook [68] the defendant, just before her projected marriage with the plaintiff, had eloped with another man. In mitigation of damages it was shown that the plaintiff had conducted himself with extreme indifference toward the defendant, had entertained no serious affection for her, and had immediately after defendant's elopement made proposals of marriage to another woman. Lord Ellenborough said that if the plaintiff appeared to be of gross manners and destitute of feeling, as he complained by this action of an injury in the loss of the society of a woman which he appeared never to have

[62] *Alabama:* Espy *v.* Jones, 37 Ala. 379.

Colorado: Fleetwood *v.* Barnett, 11 Col. App. 77, 52 Pac. 293.

See, however, an intimation to the contrary effect in Wells *v.* Padgett, 8 Barb. (N. Y.) 323.

[63] Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126.

[64] Albertz *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

[65] 34 Ia. 496, 11 Am. Rep. 154.

[66] 31 Mich. 475.

[67] Edge *v.* Griffin (Tex. Civ. App.), 63 S. W. 148.

[68] 4 Esp. 256.

valued, and the pleasures of which society he seemed little calculated to taste, the jury should take it into their consideration in their verdict.

On the other hand, the defendant should not be allowed to prove his own feelings in order to mitigate the damages; for that would be allowing him to shelter himself behind his own wrong. Thus in Piper *v.* Kingsbury [69] it was held that the jury could not consider in mitigation of damages the possible consequences of an unhappy marriage with the defendant, rendered such by the want of that love and affection which a husband should bear his wife, the court saying: "It would virtually have been saying that the plaintiff ought not to recover the damage actually sustained, because the defendant might have inflicted a greater."

It has been held by a majority of the New York Court of Appeals that the defendant might show in mitigation of damages in this action, that the breach proceeded from no change of feeling on his part, but was in deference to the wishes of his mother, a woman in infirm health.[70] But such evidence must be taken merely as tending to reduce the standard to compensatory, and to exclude exemplary damages. The plaintiff cannot be the less entitled to compensation for the injury sustained, because of the circumstances which palliate the defendant's conduct.

§ 641b. Physical defects of the parties.

Physical defects or bad health on the part of either party may be shown in mitigation. Thus, it may be shown in mitigation, that the defendant was affected with an incurable disease at the time of his breach of the promise.[71] So bad health on the part of the plaintiff may be shown, on the ground that damages may be affected by any condition of mind or body which unfits a party to fulfil the position of wife or husband.[72] If, however, this condition was known to the defendant at the time of entering into the engagement the case is otherwise. Thus in Lohner

[69] 48 Vt. 480, 486.

[70] Johnson *v.* Jenkins, 24 N. Y. 252.

[71] *Illinois:* Sprague *v.* Craig, 51 Ill. 288, 2 Am. Rep. 301.

Indiana: Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199.

[72] Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267.

v. Coldwell [73] the defendant attempted to mitigate damages by showing that there was insanity in the plaintiff's family. The court held that this could not be done in the absence of evidence that the defendant was ignorant of the fact when he entered into the engagement, and that he broke off the engagement in consequence of the insanity.

Close kinship of the parties cannot be shown in mitigation of damages.[74]

§ 641c. Offer of performance after breach.

An offer of the defendant, after breach, to marry the plaintiff may be shown as bearing on the amount of damages.[75] This is perhaps not properly mitigation of damages, but on general principles it would show that the plaintiff had an opportunity to avoid the loss of the pecuniary advantages of the marriage, and therefore should not recover compensation for the loss of such advantages.

Under certain circumstances the offer will not mitigate the damages; as where the defendant by his misconduct has made an acceptance of the offer impossible. In such a case the Supreme Court of Michigan said: [76]

"The contract of marriage is one so dependent upon affection that where this is wanting, a union would be more likely to add to than lessen the damages; instead of bringing happiness to the parties, it would be more likely to entail lifelong misery on one or both. The affection which the plaintiff may have had for the defendant, and under the influence of which she may even eagerly have accepted a matrimonial alliance with him, may by his subsequent conduct have been turned into loathing and contempt, so that a marriage which at a certain time would have been to her one of the most desirable of events, would at a subsequent period, even in thought, be repulsive.

[73] 15 Tex. Civ. App. 444, 39 S. W. 591.

[74] Albertz *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

[75] *United States:* McCarty *v.* Heryford, 125 Fed. 46.

Alabama: Kelly *v.* Renfro, 9 Ala. 325, 44 Am. Dec. 441.

Indiana: Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275.

Contra, Holloway *v.* Griffith, 32 Iowa, 409, 7 Am. Rep. 208.

[76] Bennett *v.* Beam, 42 Mich. 346, 352, 4 N. W. 8, 36 Am. Rep. 442.

"A supposed virtuous man of wealth, refinement, and respectability, gains the affections of a young lady, and under a promise of marriage accomplishes her ruin, then abandons her and enters upon a life of open and notorious profligacy and debauchery, and when sued he offers to carry out his agreement—offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. To hold that the offer of such a skeleton, and refusal to accept, could be considered even in mitigation of damages, would shock the sense of justice and be simply a legal outrage. Such an offer could in no way atone for the past, or have any tendency to show that the defendant had not, and was not acting in a most heartless and outrageous manner."

But these remarks must be taken in the light of the peculiar circumstances. This is, indeed, true in every case where evidence of circumstances of mitigation or aggravation is offered. It is not to be supposed that in a proper case, as, for instance, where defendant had honestly believed the plaintiff to be of bad character, and subsequently discovered his mistake offered reparation, the court would have rejected evidence of the facts.

CHAPTER XXIX

CONTRACTS OF CONSTRUCTION

§ 642. Damages recoverable by builder.
643. Damages for failure to build.
644. Defective construction.
645. Delay in construction.
646. On contract to supply machinery or power for buildings.
646a. On contract to furnish materials for building.
646b. On contract to repair.
§ 647. Building and repairing roads.
647a. Building or repairing a bridge.
647b. Constructing a railroad.
647c. Other contracts of construction.
648. Actions by or against architects.
648a. Breach of contract by subcontractor.

§ 642. Damages recoverable by builder.

Where the owner cancels the contract, or refuses to permit performance by the defendant, the measure of damages is the profit of the contract, that is, the contract price less the cost of completing performance.[1] The prevailing opinion is, that if the contractor has made sub-contracts which he is

[1] *Alabama:* Tutwiler *v.* Burns, 160 Ala. 386, 49 So. 455.

Arkansas: Womble *v.* Hickson, 91 Ark. 266, 121 S. W. 401.

California: O'Connell *v.* Main & T. S. H. Co., 90 Cal. 515, 27 Pac. 373, 25 Am. St. Rep. 145.

Illinois: Ryan *v.* Miller, 153 Ill. 138, 38 N. E. 642.

Massachusetts: John Soley & Sons *v.* Jones (Mass.), 95 N. E. 94.

Michigan: Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857.

Minnesota: Swanson *v.* Andrews, 83 Minn. 505, 86 N. W. 465.

Nebraska: Von Dorn *v.* Mengedoht, 41 Neb. 525, 59 N. W. 800.

New Jersey: Wilson *v.* Borden, 68 N. J. L. 627, 54 Atl. 815; Sullivan *v.* Moffatt, 70 N. J. L. 4, 56 Atl. 304.

New York: McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Miller *v.* Hahn, 23 App. Div. 48, 48 N. Y. Supp. 346; Schlesinger *v.* Ritchie, 115 N. Y. Supp. 116.

Pennsylvania: Shallenberger *v.* Standard S. M. Co., 223 Pa. 220, 72 Atl. 500.

South Carolina: Feaster *v.* Richland Cotton Mills, 51 S. C. 143, 28 S. E. 301.

Texas: Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. E. 586.

Washington: Chase *v.* Smith, 35 Wash. 631, 77 Pac. 1069.

See *ante*, § 614.

If the plaintiff has already received more than his outlay and the profits he is able to prove, he can recover nothing. McElwee *v.* Bridgeport L. & I. Co., 54 Fed. 627, 13 U. S. App. 195, 4 C. C. A. 525.

obliged to break on account of the cancellation of the contract he is not entitled to compensation for the damage he must pay the sub-contractor; apparently on the ground that the loss is remote.[2] Any materials of the builder which are used by the owner after the breach are of course to be paid for,[3] though if they are considered in the profit the builder of course cannot a second time recover their value.[4] It has been held in New York that the plaintiff cannot prove sub-contracts into which he has entered in order to show what profit he would have made on the contract; [5] but on the other hand, when after the breach the house was completed by the defendant, it has been held in Alabama that the defendant might show the cost of completion for the purpose of showing the amount of profit plaintiff would have made.[6] In Swanson *v.* Andrews [7] a builder was to receive an additional amount if certain changes were made in the plans. This builder was discharged, and another was employed to build the house, and the changes were in fact made. It was held nevertheless that the first builder was not entitled to compensation based on the extra work, since he was not entitled by the contract to do it.

Where upon a contract to construct, the defendant delayed the construction, the plaintiff, who was the contractor, was allowed to recover the increased cost of construction caused thereby.[8] Mitchell, J., said:

"Where a contractor in good faith enters upon the performance of a contract, and incurs expense, the employer having notice of that fact, if the employer, either by an order or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work it will be

[2] Smith *v.* United States, 11 Ct. Cl. 707.

Contra, Smith *v.* Flanders, 129 Mass. 322.

[3] *Alabama:* Tutwiler *v.* Burns, 160 Ala. 386, 49 So. 455.

New York: Carlin *v.* New York, 132 App. Div. 90, 116 N. Y. Supp. 346.

[4] Smith *v.* Davis, 150 Ala. 106, 43 So. 729.

[5] Brodie *v.* Fost, 123 App. Div. 749, 108 N. Y. Supp. 414; Wetter *v.* Kleinert, 139 App. Div. 220, 123 N. Y. Supp. 755.

[6] Smith *v.* Davis, 150 Ala. 106, 43 So. 729.

[7] 83 Minn. 505, 86 N. W. 465.

[8] Louisville & N. R. R. *v.* Hollerbach, 105 Ind. 137, 145, 151, 5 N. E. 28.

implied that all loss, necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him. The contractor may not acquiesce in the suspension in silence, and upon the resumption and completion of the work claim the contract price, and damages for that which may have occurred with his acquiescence. If, however, notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held that the loss must fall upon the contractor in case of a voluntary resumption of the contract. . . . The plaintiff may recover as damages any direct loss which he sustained by the unreasonable suspension or delay of the work by the employer. The employer must have had notice that the suspension would result in loss, and the suspension must not have been consented to by the contractor."

In this case the contractor recovered compensation for injury to tools, and interest for the period of delay upon all moneys invested upon materials furnished for the work, and labor necessary in furnishing them.[9] So where the plaintiff and defendant entered into a written contract, by which the former agreed for a certain sum to be paid him by the latter to do the carpenter's work on a school-house to be built, and furnish and use the necessary materials, and that he would "commence said work and proceed therewith without delay, and in such a manner as not to delay the contractor for the mason work," it was held that this covenant implied a correlative obligation on the part of the defendant to have his building in readiness for the plaintiff to perform the condition; and that the plaintiff, having sustained damages from the defendant's delay in having the building ready for him to do the work, could maintain an action to recover the amount of his damages, in which was included his increased expense from the delay.[10] The contractor is entitled to recover all

[9] *Acc.*, Langford *v.* United States, 95 Fed. 933; Kellogg Bridge Co. *v.* United States, 15 Ct. Cl. 206.

[10] Allamon *v.* Albany, 43 Barb. (N. Y.) 33; Weeks *v.* Rector, etc., of Trinity Church, 36 App. Div. 195, 67 N. Y. Supp. 670.

other expenses and inconvenience caused by the delay,[11] such as wages necessarily paid while the work was delayed,[12] enhanced cost of labor after the work was resumed,[13] enhanced price of materials,[14] and deterioration of materials during the delay.[15] But he cannot recover for any interruption of his work which he should have foreseen and guarded against.[16]

§ 643. Damages for failure to build.

The measure of damages for the failure of a contractor to construct a building is the reasonable cost of having the building constructed by another contractor less the contract price.[17] Where a certain portion of the building is left undone the same rule applies; that is, the increased cost of completion is the measure of damages for failure to complete.[18] So where a builder was to build a cornice in the ceiling of a room at a certain price and failed to do so, the measure of damages

[11] *Illinois:* Cook County *v.* Sexton, 16 Ill. App. 93.

South Dakota: Hickok *v.* W. E. Adams Co., 18 S. D. 14, 99 N. W. 77.

Texas: Hood *v.* Raines, 19 Tex. 400.

[12] *United States:* Figh *v.* United States, 8 Ct. Cl. 319; Bitting *v.* United States, 25 Ct. Cl. 502.

New Hampshire: Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456.

[13] Figh *v.* United States, 8 Ct. Cl. 319; Bitting *v.* United States, 25 Ct. Cl. 502; Langford *v.* United States, 95 Fed. 933.

[14] Figh *v.* United States, 8 Ct. Cl. 319; Kelly *v.* United States, 31 Ct. Cl. 361.

[15] Figh *v.* United States, 8 Ct. Cl. 319; Langford *v.* United States, 95 Fed. 933.

[16] Thomas W. Finucane Co. *v.* Board of Education, 190 N. Y. 76, 82 N. E. 737.

[17] *United States:* Hunt *v.* Oregon P. Ry., 36 Fed. 481; American Surety Co. *v.* Woods, 106 Fed. 263, 45 C. C. A. 282.

Massachusetts: Hebb *v.* Welch, 185 Mass. 335, 70 N. E. 440.

New York: National Contracting Co. *v.* Hudson River W. P. Co., 118 App. Div. 665, 103 N. Y. Supp. 641.

Oregon: Savage *v.* Glenn, 10 Ore. 440.

So in a covenant by landlord to build a wall for the tenant, the wall not being built, the measure of damages is the cost of building the wall with compensation for loss of use of the premises during rebuilding. Fisher *v.* Goebel, 40 Mo. 475; *acc.*, Candler Inv. Co. *v.* Cox, 4 Ga. App. 763, 62 S. E. 479.

Where the contract gives the owner the right to complete the contract at the expense of the builder, and he does so in good faith, he may recover the cost of so doing without the necessity of proving the cost reasonable. Bair *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281.

[18] *New York:* McGrath *v.* Horgan, 72 App. Div. 152, 76 N. Y. Supp. 412; Deeves *v.* Richardson & Boynton Co., 59 N. Y. Super. Ct. 423, 14 N. Y. Supp. 633; Watts *v.* Board of Education, 9 App. Div. 143, 41 N. Y. Supp. 141.

Texas: Mills *v.* Paul (Tex. Civ. App.), 30 S. W. 558.

was the cost of placing the cornice in the ceiling less the contract price for doing so.[19] If the building is left incompleted it is immaterial that in its incomplete condition its value for purposes of sale is not lessened by reason of the work left undone; so where the owner of a house which the defendant had failed to complete sold it in the condition in which the defendant left it and there was no evidence that the price he received was less than he would have received if the defendant's contract had been fully performed, he nevertheless was entitled to recover the cost of completing according to the contract.[20]

§ 644. Defective construction.

Where the building is completed but the construction is in some respect defective, the principle upon which damages are to be estimated will depend on whether the defect can be remedied by the expenditure of a reasonable amount of money. If in view of the expense it is reasonable to remedy the defect, then the measure of damages is the cost of remedying it.[21] If, on the other hand, the value of the building with the defect is greater than its value without the defect less the cost of applying the remedy, then the measure of damages is the diminution in the value of the building by reason of the defect.[22]

[19] New York Metal Ceiling Co. *v.* City Homes Imp. Co., 88 N. Y. Supp. 233.

[20] Ekstrand *v.* Barth, 41 Wash. 321, 83 Pac. 305.

[21] *California:* Carpenter *v.* Ibbetson, 1 Cal. App. 272, 81 Pac. 1114.

Kentucky: Forbes *v.* Hunter, 31 Ky. L. Rep. 285, 102 S. W. 246.

Massachusetts: Goddard *v.* Barnard, 16 Gray, 205.

Michigan: Germain *v.* Union School District, 158 Mich. 214, 122 N. W. 524.

Missouri: Hirt *v.* Hahn, 61 Mo. 496; Wright *v.* Sanderson, 20 Mo. App. 534.

Ohio: Somerby *v.* Tappan, Wright, 229.

Pennsylvania: Morgan *v.* Gambol, 230 Pa. 165, 79 Atl. 410.

Tennessee: Gibson *v.* Carlin, 13 Lea, 440.

Virginia: Lambert *v.* Jenkins, 71 S. E. 718.

[22] *Colorado:* Schafer *v.* Gildea, 3 Colo. 15.

Kentucky: Taulbee *v.* Moore, 106 Ky. 749, 51 S. W. 564; Short *v.* Moore, 19 Ky. L. Rep. 1225, 43 S. W. 211; Hartford Mill Co. *v.* Hartford T. W. Co., 121 S. W. 477.

Massachusetts: White *v.* McLaren, 151 Mass. 553, 24 N. E. 911.

New York: Walter *v.* Hangen, 71 App. Div. 40, 75 N. Y. Supp. 683; Haist *v.* Bell, 24 App. Div. 252, 48 N. Y. Supp. 405.

Oregon: Chamberlin *v.* Hibbard, 26 Ore. 428, 38 Pac. 437.

But see American Surety Co. *v* Lyons, 44 Tex. Civ. App. 150, 97 S. W. 1080. In this case the court, in answer to the contention that the dif-

In no case can the measure of damages be reduced to the cost of a remedy for the defect which does not really give to the owner substantially what he had contracted for. So, where a flue in a building was faultily constructed, and it was claimed that the defect could be remedied by putting on a certain kind of ventilator, the court held that damages could not be confined to the cost of putting in the ventilator if the ventilator injured the appearance of the building or for other reasons was undesirable.[23]

Where the building is defectively constructed, consequential damages may be recoverable in addition to the cost of remedying the defect or the diminution in value.[24] So in case of a defective roof, the owner may recover compensation for injuries to the contents of the building by rain.[25] Loss of use of the building during the necessary repairs may also be recovered.[26]

§ 645. Delay in construction.

Where a contractor does not finish a house in the time agreed, but is afterward allowed to go on with the contract, the owner recovers the value of the use of the building during the delay, or in other words the rental value of the building.[27]

erence in value, if less than the cost of completion, was the limit of recovery said: "To adopt the measure of damages contended for would be to force appellee to forego the benefit of her bargain and accept and pay for a building different from that contracted for. She had the right to demand that the building be completed according to the contract, and, if the contractor refused to remedy the defects in the building as constructed by him, she was entitled to recover as damages the amount it would cost her over and above the contract price to have the defects remedied and the building completed in accordance with the contract."

[23] Larrimore *v.* Comanche County (Tex. Civ. App.), 32 S. W. 367.

[24] Wright *v.* Sanderson, 20 Mo. App. 534 (improper foundation; recover for injury to building by cracks in wall caused by defect in foundation).

[25] *Missouri:* Haysler *v.* Owen, 61 Mo. 270.

Tennessee: Gibson *v.* Carlin, 13 Lea, 440.

In Goddard *v.* Barnard, 16 Gray (Mass.), 205, the form of the contract was held to prevent recovery of such damage.

[26] *Massachusetts:* White *v.* McLaren, 151 Mass. 553, 24 S. E. 911.

Ohio: Somerby *v.* Tappan, Wright, 229.

See Lord *v.* Comstock, 52 N. Y. Super. Ct. 548 (cannot recover for loss of particular chance to let the building during the delay).

[27] *Colorado:* McIntire *v.* Barnes, 4 Colo. 285.

The owner cannot recover rent which could have been realized from any particular lease; that not having been contemplated by the builder; [28] and it is therefore immaterial to show that the building could have been rented.[29]

Damages for loss of a particular use cannot be recovered in the absence of evidence that notice of this use was given to the defendant.[30] So rent paid by the plaintiff for another house cannot be recovered.[31]

If, however, there is notice of the special use, damages may be recovered for consequential damages in a proper case. So where there was notice of the intended use of the house for a

Georgia: Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

Illinois: Korf *v.* Lull, 70 Ill. 420; Hawley *v.* Florsheim, 44 Ill. App. 320; Galbraith *v.* Chicago A. I. Works, 50 Ill. App. 246.

Iowa: Novelty Iron Works *v.* Capitol City Oatmeal Co., 88 Ia. 524, 55 N. W. 518.

Kentucky: Simon *v.* Lanius, 9 Ky. L. Rep. 59.

Maryland: Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

Massachusetts: C. W. Hunt Co. *v.* Boston El. Ry., 199 Mass. 220, 85 N. E. 446.

Michigan: Covode *v.* Principaal, 110 Mich. 672, 68 N. W. 987.

Missouri: McConey *v.* Wallace, 22 Mo. App. 377; Dengler *v.* Auer, 55 Mo. App. 548.

New York: Ruff *v.* Rinaldo, 55 N. Y. 664; Hexter *v.* Knox, 63 N. Y. 561; Lord *v.* Comstock, 52 N. Y. Super. Ct. 548.

Oregon: Savage *v.* Glenn, 10 Ore. 440.

Pennsylvania: Rogers *v.* Bemus, 69 Pa. 432; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

South Carolina: Harwood *v.* Tappan, 2 Spear, 536.

Texas: J. T. Stark Grain Co. *v.* Harry Bros. Co. (Tex. Civ. App.), 122 S. W. 947.

If no rental value or value of use can be proved, the plaintiff may recover at least nominal damages. Smith *v.* Green (Tex. Civ. App.), 122 S. W. 919.

[28] *Georgia:* Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

Illinois: Hawley *v.* Forsheim, 44 Ill. App. 320.

Maryland: Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

New York: Lord *v.* Comstock, 52 N. Y. Super. Ct. 548.

In Consaul *v.* Sheldon, 35 Neb. 247, 52 N. W. 1104, the plaintiff was allowed to show an actual lease of the building, it appearing that the rent was less than the reasonable rental value. The court intimated that under these circumstances the plaintiff would be restricted to the agreed rent; but this would seem a mistake. See § 243*a*.

[29] *Illinois:* Galbraith *v.* Chicago A. I. Works, 50 Ill. App. 246.

Michigan: Covode *v.* Principaal, 110 Mich. 672, 68 N. W. 987.

A few decisions to the contrary must be regarded as erroneous, and overruled by the late cases: *e. g.* Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175.

[30] Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 246.

[31] *Georgia:* Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

Kentucky: Jaudes *v.* Fisher, 5 Ky. L. Rep. 768.

dwelling house for plaintiff into which his furniture must be put at a certain time, he may recover the cost of storing the furniture.[32] So where the defendant knew that the plaintiff needed the structure in order to land coal from vessels during a coal strike, he was responsible for the loss to plaintiff from failure to have it for such use; and the cost of furnishing a substitute for the purpose was recoverable.[33] And where defendant contracted to build a gas-holder to be furnished December 1, and he had notice that it would be needed during each December and January only, the owner could recover a year's rental for a two months' delay.[34] Where defendant had notice that the building which he agreed to construct was leased, he is liable for loss of rent; though not for special damages paid by plaintiff to the lessee under a special clause in the lease of which he had no notice.[35] So where the plaintiff and defendant owned adjoining buildings and the defendant wished to take down a party wall between them and contracted with plaintiff that it should be rebuilt within three weeks, and plaintiff thereupon with knowledge of the defendant made an agreement with her tenant that if the repairs lasted more than three weeks she should pay a large compensation per day, and defendant did not complete the repairs within three weeks, it was held that he was responsible for the amount of money plaintiff had to pay her tenant under the agreement.[36] In any case the specific profits anticipated from use of the building cannot be recovered; they are too uncertain.[37]

[32] Hexter *v.* Knox, 63 N. Y. 561.

[33] C. W. Hunt Co. *v.* Boston El. Ry. 199 Mass. 220, 85 N. E. 446.

[34] Wood *v.* Joliet Gaslight Co., 111 Fed. 463.

[35] Albany Phosphate Co. *v.* Hugger Bros., 4 Ga. App. 771, 62 S. E. 533.

[36] McLaren *v.* Fischer, 45 App. Div. 13, 61 N. Y. Supp. 808.

In Haven *v.* Wakefield, 39 Ill. 509, the plaintiff sued for delay in performance of a contract to build a building and lease it to the plaintiff for storing broom brush and manufacturing brooms. By reason of delay the brush had to be stored in the building before it was completed and was injured by the weather. The plaintiff was also delayed in harvesting his crop, and some of it suffered injury from frost. Such damage was held proximate, and could be recovered.

[37] *Illinois:* Haven *v.* Wakefield, 39 Ill. 509.

Pennsylvania: Rogers *v.* Bemus, 69 Pa. 432; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125.

South Carolina: Harwood *v.* Tappan, 2 Spear, 536.

Texas: J. T. Stark Grain Co. *v.* Harry Bros. Co. (Tex. Civ. App.), 122 S. W. 947.

But while the profits expected from the use of the building cannot be recovered as themselves furnishing the measure of damages, the cost of the building, its depreciation and the depreciation of its machinery while in operation and the profits that could be made with the building, are proper to be considered in arriving at the rental value.[38]

§ 646. On contract to supply machinery or power for buildings.

For breach of a contract to supply machinery or power for a building, the direct damage is the expense of procuring the machine or power elsewhere, less the contract price.[39] Since in the case of such a contract there is knowledge of the purpose of the supply, the plaintiff may also recover compensation for loss of use of the premises, which will amount to the rental value,[40] not the expected profits.[41] Where the machinery supplied is defective, the plaintiff may recover the cost of remedying the defect.[42] If the premises were reasonably operated, and the defect caused an injury to the premises, the amount of this injury may also be recovered; [43] and so where the attempt

[38] Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Ia. 524, 55 N. W. 518.

[39] Citizens' Elec. Light & P. Co. *v.* Gonzales Water Power Co. (Tex. Civ. App.), 76 S. W. 577 (failure to furnish water wheel).

[40] *Illinois:* Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519 (machine to break ice).

Michigan: McKinnon *v.* McEwan, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458 (boilers for power).

[41] *Illinois:* Consumers' P. I. Co. *v.* Jenkins, 58 Ill. App. 519.

Kansas: Paola Gas Co. *v.* Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598 (failure to furnish gas for fuel).

Michigan: McKinnon *v.* McEwan, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458; Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463 (barrel plant for flour mill). But see Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637. In that case the business was established, and the contract was for the replacing of one machine by another; it was rightly held that recovery could be had for loss of profits of an established business.

[42] *New York:* Davis *v.* Talcott, 14 Barb. 611 (machinery in mill).

Pennsylvania: Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. 167, 32 Atl. 432 (furnace for making glass); Morse *v.* Arnfield, 15 Pa. Super. Ct. 140 (elevator).

Vermont: Clifford *v.* Richardson, 18 Vt. 620 (machinery in mill).

Canada: Crompton & K. L. Works *v.* Hoffman, 5 Ont. L. R. 554 (loom in factory). Colton *v.* Good, 11 Up. Can. Q. B. 153, *contra*, must be regarded as overruled on this point.

[43] *New York:* Cassidy *v.* Le Fevre, 45 N. Y. 562 (damage by exploding boiler).

to operate with the defective machine caused loss of material.[44] If the defect results in a stoppage of the plant, the rental value of the plant may also be recovered,[45] but not compensation for the expected profits, since they are ordinarily too conjectural.[46] It would seem, however, that if the defendant had notice that the premises would be stopped if the machine were defective, and the business was an established one, so that the profits could be proved with reasonable certainty, recovery might be had for loss of profits.[47] When the fitting out of a building with machinery is delayed, the owner may recover for the loss of use of the building, measured by the rental value.[48] No recovery can be had for loss of anticipated profits,[49] though in the case

Pennsylvania: Erie City Iron Works *v.* Barber, 102 Pa. 156 (damage by explosion of boiler).

Canada: Colton *v.* Good, 11 Up. Can. Q. B. 153 (damage by mill stone broken during operation).

[44] *Kansas:* Paola Gas Co. *v.* Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

Pennsylvania: Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. 167, 32 Atl. 434 (loss of material in operating defective furnace).

[45] *New York:* Cassidy *v.* Le Fevre, 45 N. Y. 562.

Pennsylvania: Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. 167, 32 Atl. 432.

[46] *New York:* Cassidy *v.* Le Fevre, 45 N. Y. 562.

Pennsylvania: Fleming *v.* Beck, 48 Pa. 309; Erie City Iron Works *v.* Barber, 102 Pa. 156; Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. 167, 32 Atl. 432.

[47] They appear to have been allowed on this principle in the following cases:

New York: Davis *v.* Talcott, 14 Barb. 611.

Vermont: Clifford *v.* Richardson, 18 Vt. 620.

Canada: Crompton & K. Loom Works *v.* Hoffman, 5 Ont. L. R. 554.

[48] *Illinois:* Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519 (ice machine).

Iowa: Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa, 524, 55 N. W. 518 (machinery for mill).

Michigan: John Hutchinson Mfg. Co. *v.* Pinch, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463 (machinery for mill: overruling on this point Allis *v.* McLean, 48 Mich. 428, 12 N. W. 640, 42 Am. Rep. 474, which was criticised in the previous edition of this work, § 186).

North Carolina: Boyle *v.* Reeder, 1 Ired. 607 (engine for mill).

[49] *United States:* Howard *v.* Stillwell & Bierce Manuf. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. ed. 147 (machinery for mill).

Illinois: Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519.

Iowa: Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Ia. 524, 55 N. W. 518.

Michigan: John Hutchinson Mfg. Co. *v.* Pinch, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463.

Minnesota: Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463 (barrel shop for mill).

Nebraska: Bridges *v.* Lanham, 14 Neb. 369, 15 N. W. 704, 45 Am. Rep. 121 (float for mill).

New York: Reilly *v.* Connors, 65

of an established business past profits may be shown to indicate the business value of the premises.[50] In one case damages were claimed for injury to stock by the delay, but they were not allowed.[51]

§ 646a. On contract to furnish materials for building.

For failure to furnish materials for building, the direct loss would be the difference between the contract and the market prices.[52]

For delay in furnishing materials for building the owner cannot usually recover compensation for loss of use of the building, on the ground that the completion of the building is thereby delayed; since such delay in completion would usually be remote, or at least unforeseen.[53] Such delay will, however, often cause a natural waste of time of workmen employed on the building; and compensation for time so lost may be recovered.[54]

When the materials supplied do not conform to the contract, and the defect is discovered at a time when it can be remedied by supplying proper materials, the measure of damages is the cost of supplying these.[55] If the materials have been used in the building, and it is too late to replace them by other materials, the measure of damages is the difference in value of the building; as when an inferior quality of lumber is supplied and used in building.[56] If because of the defect in the materials,

App. Div. 470, 72 N. Y. Supp. 834 (heating plant; cannot recover anticipated rent).

North Carolina: Boyle *v.* Reeder, 1 Ired. 607.

[50] Williams *v.* Island City M. & M. Co., 25 Ore. 573, 37 Pac. 49 (machinery for mill).

[51] Boyle *v.* Reeder, 1 Ired. (N. C.) 607 (machinery for mill).

[52] *Minnesota:* Liljengren Furniture & L. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

New York: Woolf *v.* Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184.

[53] *Minnesota:* Liljengren Furniture & L. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

New York: Woolf *v.* Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184.

Vermont: Eddy *v.* Clement, 38 Vt. 486.

[54] *Kentucky:* Clark *v.* Koerner, 61 S. W. 30.

Ohio: Block-Pollak Iron Co. *v.* Cincinnati C. I. Co., 10 Ohio Dec. 51.

[55] *Iowa:* Indianapolis Terra Cotta Co. *v.* Murphy, 99 Iowa, 633, 68 N. W. 898.

Missouri: Spink *v.* Mueller, 77 Mo. App. 85.

[56] *Indiana:* Elwood Planing Mills Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621.

Minnesota: Wheaton *v.* Lund, 61 Minn. 94, 63 N. W. 251.

not discoverable while they were being used, the building is injured, the owner may recover compensation for such injury.[57]

§ 646b. On contract to repair.

If a contract to repair premises is not properly performed, the plaintiff may recover the cost of completing the repairs.[58] Compensation may also be recovered for loss of use of the premises until the repairs are properly completed, based on the rental value of the premises,[59] or if the premises can be used in part, the difference in rental value with and without the repairs,[60] but ordinarily not damage to business or loss of profits.[61] Consequential damage may be recovered in a proper case, where the defendant had notice; as for idleness of hands on breach of contract to make repairs in a mill,[62] or injury to tenants on defective repair of a roof.[63]

§ 647. Building and repairing roads.

Upon delay in building a road for the plaintiff, he may recover the cost of building a temporary road to use during the delay.[64]

Where the contractor for building a road is delayed by the defendant, he may recover compensation for the increased cost of labor and materials caused by the delay.[65]

[57] *Ohio:* Block-Pollak Iron Co. *v.* Cincinnati C. I. Co., 10 Ohio Dec. 51 (defect in iron furnished; recovery for consequent blowing off of roof).

Pennsylvania: Haines *v.* Young, 13 Pa. Super. Ct. 303 (defect in metal supports for marble slabs; marble slab fell and broke; recovery for loss).

[58] *Tennessee:* Fort *v.* Orndoff, 7 Heisk. 167.

Vermont: Clifford *v.* Richardson, 18 Vt. 620.

[59] *Michigan:* John Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156, 51 N. W. 930.

Oregon: Williams *v.* Island City Milling Co., 25 Ore. 573, 37 Pac. 49.

Texas: Bounds *v.* Hickerson, 26 Tex. Civ. App. 608, 63 S. W. 887. If the plaintiff had the right under the contract to make the repairs himself at the defendant's expense, he cannot charge the defendant with loss of use of the mill after he might himself have made the repairs. Fort *v.* Orndoff, 7 Heisk. (Tenn.) 167.

[60] Winne *v.* Kelley, 34 Iowa, 339.

[61] *Georgia:* Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602.

Kansas: Walrath *v.* Whittekind, 26 Kan. 482.

[62] Coweta Falls Manuf. Co. *v.* Rogers, 19 Ga. 416, 65 Am. Dec. 602.

[63] Malony *v.* Brady, 18 N. Y. Supp. 757.

[64] Smith *v.* Smith, 45 Vt. 433.

[65] King *v.* Des Moines, 99 Iowa, 432, 68 N. W. 708.

For breach of a contract to keep a road in repair the plaintiff may recover the reasonable cost of making the repairs.[66]

Where the road was improperly built, the diminution in value should be recoverable. In such a case it was held that the county for which the road was being built was entitled to the amount saved by the contractors by their imperfect construction,[67] and it seems clear that such an amount at least is recoverable.

§ 647a. Building or repairing a bridge.

Where a contract to build a bridge is cancelled, the builder may recover the profits of the contract.[68] If the owner delays the work, the builder may recover damages caused by the delay, including interest on the amount of money invested in the work during the time of delay.[69]

If the builder erects the bridge defectively, as where the iron used is not as heavy as was agreed, the measure of damages is the difference in value of the bridge. This is to be arrived at by finding the increased cost of the additional weight of metal, including also the profit which the evidence showed a contractor would have added, to the actual cost to him of the metal.[70] In Railroad Co. *v.* Smith,[71] the plaintiff was allowed to recover for the delay of trains and for extra men to work a defectively built bridge.

For delay in erecting a railroad bridge, the railroad may recover for loss of use of the road; which in case of a new road will be measured by interest on the cost of the unused portion.[72]

Where the defendant undertook to keep a bridge standing and in repair and it was carried away by a flood, the measure of damages was held to be the cost of rebuilding the bridge plus

[66] *Massachusetts:* Clark *v.* Russell, 110 Mass. 133.

New York: Mayor, etc., *v.* Second Ave. R. R., 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905.

[67] Board of Commissioners *v.* Wolff (Ind.), 72 N. E. 860.

[68] Insley *v.* Shepard, 31 Fed. 869.

[69] Louisville & N. R. R. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

[70] Modern Steel Structural Co. *v.* Van Buren County, 126 Iowa, 606, 102 N. W. 536.

[71] 21 Wall. 255, 22 L. ed. 513

[72] American Bridge Co. *v.* Camden Interstate Ry., 135 Fed. 323, 68 C. C. A. 131.

the premium that might be necessary to procure an insurance against similar loss for the remainder of the term for which covenant to keep it in repair was to remain in force.[73]

§ 647b. Constructing a railroad.

For breach by the company of a contract to construct for it the whole or a portion of the roadbed of a railroad, the measure of damages is the difference between the contract price and the cost of construction;[74] and if the company wrongfully delays the work, the contractor may recover the loss caused by delay, such as wages lost,[75] but not conjectural or remote damages.[76]

For delay by the contractor the company cannot recover compensation based on the expected profits, as they are too

[73] Gathwright *v.* Callaway County, 10 Mo. 663. This must be regarded as the case of a special contract. In the ordinary case the defendant would be discharged from his obligation by the destruction of the bridge without his fault. Livingston Co. *v.* Graves, 32 Mo. 479.

[74] *Alabama:* Danforth *v.* Tennessee & C. R. R., 93 Ala. 614, 11 So. 60. Tennessee & C. R. R. *v.* Danforth, 13 So. 51, 112 Ala. 80, 20 So. 502.

Missouri: Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 646.

Tennessee: Smith *v.* O'Donnell, 8 Lea, 468.

Texas: O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168.

In Brucker *v.* Manistee & G. R. R. (Mich.), 130 N. W. 822, defendant refused to let plaintiff complete performance of contract to build road. The defendants after refusing to allow plaintiff to proceed, themselves completed the contract at a price greater than the contract price. It was held that plaintiff was not bound by this price, but might show that it could have been done cheaper. The defendant having by the contract the option of changing the route, the plaintiff could recover only the profit on building the road according to the route as it was changed, although this change happened after the breach.

[75] *United States:* Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

Alabama: Hardaway-Wright Co. *v.* Bradley Bros. (Ala.), 57 So. 21.

Iowa: Graves *v.* Glass, 86 Ia. 261, 53 N. W. 231.

Missouri: Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 646.

New York: Curnan *v.* Delaware & O. R. R. R., 138 N. Y. 480, 34 N. E. 201.

Texas: O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168.

[76] *United States:* Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

Indiana: Louisville & N. R. R. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

Missouri: Tucker *v.* Deering S. W. Ry., 133 Mo. App. 122, 113 S. W. 242.

Tennessee: Smith *v.* O'Donnell, 8 Lea, 468.

Texas: O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168.

Virginia: Atlantic & D. Ry. *v.* Delaware Const. Co., 98 Va. 503, 37 S. E. 13.

conjectural.[77] The proper measure of recovery is the rental value of the road during the period of delay.[78]

If the company, rightly or wrongly, puts an end to the contract after part performance, it cannot retain any portion of payments due which by agreement were to be retained as security for performance, as such an agreement is one for a penalty.[79]

§ 647c. Other contracts of construction.

The rules for the assessment of damages are the same in the case of other contracts of construction. Where the contractor fails to perform his contract to do certain work, the measure of damages is the cost to the owner of having it done by another, less the contract price if that has not been paid.[80] The owner, since he can have the work done by another, cannot recover for any loss that accrues by reason of the work remaining undone after the lapse of a reasonable time,[81] nor can he recover compensation for loss of expected profits.[82] For delay in construction, the owner may recover damages for loss of use of the property rendered useless during the delay,[83] but not for loss of expected profits.[84] For improper construction, the

[77] *Georgia:* Florida N. R. R. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130.

Pennsylvania: Jolly *v.* Parral & D. R. R., 35 Pittsb. L. J. (N. S.) 37.

A fortiori the expected profits by enhancement of the value of land owned by the company cannot be recovered. Coos Bay R. & E. R. & N. Co. *v.* Nosler, 30 Ore. 547, 48 Pac. 361.

[78] Jolly *v.* Parral & D. R. R., 35 Pittsb. L. J. (N. S.) 37.

[79] *Georgia:* Florida N. R. R. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130.

New York: Curnan *v.* Delaware & O. R. R. R., 138 N. Y. 480, 34 N. E. 201.

[80] *Kentucky:* Hazlip *v.* Austill, 4 Ky. L. Rep. 982 (to dig well).

Louisiana: Hammond O. & D. Co. *v.* Feitel, 115 La. 132, 38 So. 941 (to dig well).

Vermont: Keyes *v.* Western V. S. Co., 34 Vt. 81 (to repair drain).

American Surety Co. *v.* Woods, 105 Fed. 741, 45 C. C. A. 282, *contra*, cannot be regarded as a sound decision.

[81] *Kentucky:* Hazlip *v.* Austill, 4 Ky. L. Rep. 982.

Vermont: Keyes *v.* Western Vermont Slate Co., 34 Vt. 81.

[82] Smith *v.* Curran, 138 Fed. 150 (irrigating works).

[83] *Georgia:* Water Lot Co. *v.* Leonard, 30 Ga. 560 (mill flume; recover value of use of mill).

Massachusetts: Willey *v.* Fredericks, 10 Gray, 357 (sea wall to protect land; recover value of use of land).

[84] *Nebraska:* Bridges *v.* Lanham, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. 704 (mill flume).

Virginia: Atlantic & D. Ry. *v.* Delaware Construction Co., 98 Va. 503, 37 S. E. 13 (pier).

owner may recover the cost of remedying the defect,[85] with proper compensation for loss of use of the premises during the time necessary to do so.[86]

For breach of contract of construction by the owner, the ordinary measure of damages is the profits of the contract.[87] Where part of the work had been performed by the contractor, but had been rendered more costly by fault of the owner, the contractor was allowed compensation for the increased cost.[88] Where the owner delays the work the contractor may recover compensation for wages of laborers and value of the use of machinery kept idle,[89] and for the increased cost of performance caused by the delay.[90]

§ 648. Actions by or against architects.

Where an architect was to obtain a certain fee for drawing plans and superintending construction, and he was prevented by the owner from superintending the construction, he is entitled to his entire fee, subject to the right of the owner to show that he might have earned a fee elsewhere in the time saved.[91]

Where an architect employed to superintend construction negligently failed to discover a defect in construction, the measure of damages recoverable against him was the cost of remedying the defect.[92]

§ 648a. Breach of contract by sub-contractor.

Where a sub-contractor fails to carry out his contract, the measure of damages is the increased cost of procuring the work

[85] Fisher *v.* Goebel, 40 Mo. 475, or the difference between the value as constructed and the value as it should have been constructed. Culbertson *v.* Ashland C. & C. Co. (Ky.), 139 S. W. 792 (cement walk).

[86] Saluda Manuf. Co. *v.* Pennington, 2 Spear (S. C.), 735.

[87] Gaffey *v.* United Shoe Machinery Co., 202 Mass. 48, 88 N. E. 330 (to remove ledge).

[88] Vicksburg W. S. Co. *v.* Gorman, 70 Miss. 360, 11 So. 680 (to build waterworks).

[89] *United States:* Cotton *v.* United States, 38 Ct. Cl. 536.

Iowa: Graves *v.* Glass, 86 Iowa, 261, 53 N. W. 231.

[90] Williston *v.* Matthews, 55 Minn. 422, 56 N. W. 1112.

[91] Graf *v.* Law, 120 Wis. 177, 97 N. W. 898.

[92] Straus *v.* Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226; Schwartz *v.* Kuhn, 126 N. Y. Supp. 568.

to be done by another.[93] If the sub-contractor performs the contract improperly, he is responsible for damages recovered against the contractor by the owner on account of the defect.[94] If by reason of the defect or by the sub-contractor's delay the completion of the building is delayed, so that the contractor suffers damage thereby, the sub-contractor is responsible.[95] In Meyer *v.* Haven [96] the defendant had contracted to build railroad shops; and the plaintiff made a sub-contract with him for the structural ironwork. The plaintiff delayed furnishing the ironwork and notice was given of the danger by reason of delay. As a result of delay the walls were blown down. In an action to enforce a mechanic's lien, the defendant sought to set off damages for this loss. It was held that defendant could set off value of the property destroyed and the cost of reconstructing the walls, and also (if the terms of the contract with the railroad were communicated to plaintiffs at the time the sub-contract was made) could set off damages resulting from the breach of that contract because of the delay. This included loss of interest and payment delayed, and increased expense of doing the work in the winter. The loss of rents is not a natural consequence of the delay.[97]

Where the sub-contractor breaks his contract with the contractor, he is responsible for all damages which the company could recover against the contractor, provided they were within his contemplation. Snell *v.* Cottingham [98] was an action on an agreement by Cottingham with Snell to build the road of the L. B. & M. Co. by a certain time. The company had leased its line to the T. W. & W. Co., agreeing to have the

[93] *Illinois:* National Surety Co. *v.* Townsend B. & C. Co., 176 Ill. 156, 52 N. E. 938.

Kansas: McCullough *v.* S. J. Hayde Contracting Co., 82 Kan. 734, 109 Pac. 176.

Kentucky: Seventh St. P. M. Co. *v.* Schaefer, 30 Ky. L. Rep. 623, 99 S. W. 341.

Maryland: Ætna Indemnity Co. *v.* George A. Fuller Co., 111 Md. 321, 73 Atl. 738.

[94] Hoppaugh *v.* McGrath, 53 N. J. L. 81, 21 Atl. 106. In this case it was held immaterial that the judgment against the contractor had not been paid.

[95] Noyes *v.* F. A. Noullet & Co., 118 La. 888, 43 So. 539.

[96] 70 App. Div. 529, 75 N. Y. Supp. 261; and on an earlier appeal 37 App. Div. 201, 55 N. Y. Supp. 864.

[97] Friedland *v.* McNeil, 33 Mich. 40 (loss of pew rents, upon delay in completion of a church).

[98] 72 Ill. 161.

line finished by a certain day, and to pay the interest on certain bonds. Snell assumed the obligations of the L. B. & M. Co. and agreed with the T. W. & W. Co. that if the road should be completed before the time agreed between the two companies the interest on the bonds should be saved for all the time gained. The time fixed by Cottingham's contract was earlier than that of the contract between the companies. Snell had made his agreement with Cottingham with reference to his contract with the company, but this Cottingham did not know. Cottingham did not finish the road within the time agreed. It was held that Snell could only recover the value of the use of the road during the delay, and that the other contract could not be considered, as it was not in the contemplation of the parties.

If the amount of damages is agreed upon between the company and the contractor by way of compromise, the subcontractor is in no case bound by the compromise.[99]

[99] Laing *v.* Hanson, 36 Tex. Civ. App. 116, 36 S. W. 116.

CHAPTER XXX

IMPLIED OR QUASI CONTRACTS

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I.—No Express Contract

§ 649. Quantum meruit.

* We have thus far spoken of express contracts made by the parties; we have still to speak of the agreements which, in the absence of any express stipulation, the law implies from a given state of facts. For property transferred or services rendered by one to another, the law implies a promise to pay what the thing or the property is worth. The party then recovers, to use technical language, on a *quantum meruit* or a *quantum*

valebat; and the measure of damages becomes a question of evidence as to the value of the property or services. Nor can this rule be varied, except by express agreement. Thus, where a father, whose infant daughter was employed by a manufacturing company, forbade them to employ her any longer, and gave them notice that if they did so he should demand a given sum for her time and labor, it was held, in an action of assumpsit against the company, that the notice was unavailing to fix the measure of compensation, and that he could only recover what her services were reasonably worth.** [1]

§ 650. Measure of compensation on a quantum meruit.

When recovery is had on a *quantum meruit* for services rendered to or benefit conferred upon the defendant at his request, the measure of compensation is the value of the work done, or in some cases the money paid, not the benefit derived by the defendant from it; [2] and the same is true where the services or benefit are accepted by the defendant, though not originally rendered at his request.[3] If the plaintiff has rendered services

[1] Adams *v.* Woonsocket Co., 11 Met. (Mass.) 327.

So where through the fraud of an architect the amount to be paid upon a building contract was greater in the builder's copy than in the owner's, and neither party discovered the discrepancy until the builder in good faith completed his work, it was held that he might recover on a *quantum meruit* the fair value of the labor and materials. Vickery *v.* Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810. The amount of recovery in such a case would of course be limited to the price named in the builder's copy.

[2] *Delaware:* Verderame *v.* Hansen, 75 Atl. 785; White *v.* Dougherty, 76 Atl. 609.

Kansas: Turner *v.* Webster, 24 Kan. 38, 36 Am. Rep. 251.

Massachusetts: Bradley *v.* Rea, 14 All. 20; Stowe *v.* Buttrick, 125 Mass. 449; Vickery *v.* Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

Michigan: Mooney *v.* York Iron Co., 82 Mich. 263, 46 N. W. 376.

New York: Bluemner *v.* Garvin, 120 App. Div. 29, 104 N. Y. Supp. 1009.

Tennessee: Edington *v.* Pickle, 1 Sneed, 122.

Where there was no agreement on the price except that it should not exceed $6.00 per day, the plaintiff recovers the value of his services up to that amount. Russell *v.* Wylly, 119 N. Y. Supp. 155.

No compensation can be recovered in this action for labor performed with the expectation of making it available in the performance of a contract with the defendant, which contract the defendant terminated before any part had been performed. Curtis *v.* Smith, 48 Vt. 116.

[3] Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Bee Printing Co. *v.* Hitchborn, 4 All. 63; Chase *v.* Corcoran, 106 Mass. 286.

the measure of recovery is the value of the services, not of the product of the service; [4] and if the plaintiff has leased property, it is the value of the use.[5] The amount paid by the plaintiff to his own workmen hired by him to do the work is not recoverable, but only the value of their work.[6] Thus, where an agent without his principal's authority borrows money and invests it in property, the principals, by afterwards appropriating and selling the property for their own benefit, will be held to have ratified the act; and the measure of their liability is the amount borrowed, and not that realized from the sale.[7] It has been held that if the plaintiff has once charged a certain amount, which has been paid, and a receipt taken in full, no greater amount can be recovered, because the jury should put no greater estimate on the value of his services than he himself put upon them.[8] The true bar to recovery in such a case seems to be that the acceptance of a certain amount in full is an accord and satisfaction.

§ 651. Contract void by statute of frauds.

In an action for work and labor, the rule of damages is the value of the service rendered, and not an oral agreement as to wages, ruled out under the statute of frauds.[9] Where a parol

[4] *United States:* Charleston I. M. Co. *v.* Joyce, 63 Fed. 916, 11 C. C. A. 496 (boring well).

Illinois: Ennis *v.* Pullman P. C. Co., 165 Ill. 161, 46 N. E. 439 (professional services).

Massachusetts: Snow *v.* Ware, 13 Met. 42 (building road).

Michigan: Turner *v.* Mason, 65 Mich. 662, 32 N. W. 846 (painting portrait).

It is the net value, deducting an allowance for defective workmanship: Wright *v.* Cumpsty, 41 Pa. 102.

[5] Adamson *v.* Adamson, 9 Ark. 26 (slaves).

[6] Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.), 729.

[7] Watson *v.* Bigelow, 47 Mo. 413.

[8] Danziger *v.* Hoyt, 46 Hun (N. Y.), 270.

[9] *Illinois:* Butcher Steel Works *v.* Atkinson, 68 Ill. 421.

New Hampshire: Emery *v.* Smith, 46 N. H. 151.

New York: Day *v.* New York C. R. R., 51 N. Y. 583, 590; Rosepaugh *v.* Vredenburgh, 16 Hun, 60.

But *contra*, Fuller *v.* Rice, 52 Mich. 435; La Du-King M. Co. *v.* La Du, 36 Minn. 473.

In King *v.* Brown, 2 Hill (N. Y.), 485, plaintiff agreed to do forty dollars worth of work and defendant in payment agreed to convey four acres of land. The work was done. The defendant refused to convey, and the contract was void by the statute of frauds. It was held that plaintiff could recover for his labor, but the amount recovered was the actual value of the labor, and not the greater value of the

contract for the sale of land is void or unenforceable by the statute of frauds, a vendee can frequently recover the consideration, generally under one of the common counts.[10] In Bender *v.* Bender [11] the rule is stated to be "Compensation for all that the plaintiff did in pursuance of the contract and in satisfaction of his part thereof, and for all permanent improvements made upon the land in reliance upon the contract with the knowledge of the defendant, deducting the value of the rents and profits during the plaintiff's occupancy." In California the measure of an intended vendee's damages is the money he has advanced, with interest, or the reasonable value of the services rendered, without reference to the express contract, and evidence of the value of the land is inadmissible.[12] In New Hampshire it is held that the actual loss sustained and expense incurred under all the circumstances of the case, taking the agreement into consideration, furnish the measure of the damages which the jury, if they see fit, may make equal to the value of the land.[13] In Mississippi, where the proposed vendor of land in bad faith refuses to consummate a parol agreement for the sale of land, the proposed vendee is entitled to compensation for the trouble and loss of time incurred in consequence of his confidence in the other, but not for the loss of his bargain.[14]

Statutes frequently make contracts to leave a legacy void unless they are in writing. In a jurisdiction in which such a statute is in force it is held that where services are rendered in pursuance of a mutual understanding that payment shall be made by bequest or devise, and the party dies without making the expected compensation, the one rendering the services may recover the value of the services from the estate.[15]

land. If the contract had been simply for a specified amount of work which was to be the consideration for the conveyance of the land, the value of the land could be shown as establishing the value of the work; but where the parties themselves had agreed on labor of a certain value, that alone could be recovered.

[10] Tripp *v.* Bishop, 56 Pa. 424; Harris *v.* Harris, 70 Pa. 170.

[11] 37 Pa. 419; *acc.*, Wright *v.* Haskell, 45 Me. 489.

[12] Fuller *v.* Reed, 38 Cal. 99.

[13] Ham *v.* Goodrich, 37 N. H. 185.

[14] Welch *v.* Lawson, 32 Miss. 170.

[15] Robinson *v.* Raynor, 28 N. Y. 494; Collier *v.* Rutledge, 136 N. Y. 621, 32 N. E. 626; Ritchie *v.* Bennett, 35 App. Div. 68, 54 N. Y. Supp. 379; Lane *v.* Calby, 95 App. Div. 11, 88 N. Y. Supp.

§ 652. Failure of consideration.

The amount paid, with interest, is the measure of damages in assumpsit to recover for failure of consideration.[16] In James *v.* Hodsden [17] the plaintiff had given his notes for a patent fraudulently represented to have some value. He compromised some of the notes. In assumpsit to recover for the failure of consideration, it was held that he could recover the amount paid to compromise the notes, even assuming that he could have defended them, for he was not bound to follow them through a long course of litigation, and it would be presumed he did his best.

§ 653. Compensation for work and labor.

Where one has incurred necessary expense or sustained damages in protecting another's property which is accidentally beyond the owner's control, and it is afterwards reclaimed by the owner, the law implies a promise to pay the expense or compensate for the damage.[18] But for services rendered gratuitously without request there can be no recovery.[19]

§ 654. Waiver of tort.

Where a person who has suffered an injury to his property is allowed to waive the tort and sue in assumpsit, the measure of damages in contract, as in tort, is the value of the property taken or destroyed.[20]

§ 655. Deviation from contract by consent—Extra work.

* So, also, where work is done under a special agreement at estimated prices, and there is a deviation from the original plan, by the *consent of the parties*, the contract is made the rule of payment, as far as it can be traced, and for the extra labor the party is entitled to his *quantum meruit*.** [21] Where the

[16] Tyler *v.* Bailey, 71 Ill. 34.

[17] 47 Vt. 127.

[18] Sheldon *v.* Sherman, 42 Barb. 368.

[19] *Post*, § 673*d*.

[20] *Indiana:* Board of Commissioners *v.* Trees, 12 Ind. App. 479, 40 N. E. 535.

New Jersey: Moore *v.* Richardson, 68 N. J. L. 305, 53 Atl. 1032.

[21] *California:* De Boom *v.* Priestly, 1 Cal. 206.

Illinois: Brigham *v.* Hawley, 17 Ill. 38; McClelland *v.* Snider, 18 Ill. 58; Chicago & G. E. R. R. *v.* Vosburgh, 45 Ill. 311.

Kentucky: Wright *v.* Wright, 1 Litt. 179; Western *v.* Sharp, 14 B. Mon. 177.

performance of a special contract was prevented by the defendant, and suit brought on the common counts, the Supreme Court of New York said: [22]

"The defendant may give the contract in evidence with a view to lessen the quantum of damages. So far as the work was done under the special contract, the prices specified in it are, as a general rule, to be taken as the best evidence of the value of the work. Where it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than it otherwise would have been, in consequence of the improper interference of the defendant, or of his neglect or omission to perform what by the contract he was bound to do, the contract prices should be held conclusive between the parties. But if the defendant neglect to furnish the materials which he was to find in due time, so that the plaintiff is obliged to do his work at a less favorable season, and at an additional expense, such expense ought to be taken into consideration and added to the contract price."

It is the duty of a contractor who has undertaken a piece of work, such as the erection of a house for a specified price, but without specification as to the manner or style of the work, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to inform the employer of the difference in cost. The employer has *prima facie* a right to suppose, unless apprised of the contrary, that every proposition as to different parts of the work is made under the contract for the whole, and is intended merely to present him with a choice of modes within that contract. To get rid of this inference, the contractor must show, either that he notified his employer that his proposition was a departure from the original

Louisiana: Jones *v.* Adams, 12 La. Ann. 621.

Maryland: Annapolis & B. S. L. R. R. *v.* Ross, 68 Md. 310.

New Hampshire: Wheeden *v.* Fiske, 50 N. H. 125.

New York: Hollinshead *v.* Mactier, 13 Wend. 276; Nason Mfg. Co. *v.* Stephens, 127 N. Y. 602, 28 N. E. 411.

Pennsylvania: McGrann *v.* North Lebanon R. R., 29 Pa. 82.

South Carolina: McCormick *v.* Connoly, 2 Bay, 401.

Wyoming: Hood *v.* Smiley, 5 Wyo. 70, 96 Pac. 856.

England: Robson *v.* Godfrey, 1 Holt N. P. 236.

[22] Koon *v.* Greenman, 7 Wend. (N. Y.) 121, 123.

design and contract, and would be attended with increased cost, or that its character necessarily gave him this information; otherwise there can be no recovery for extra work.[23] As to costly work done in his absence, and in a manner not previously approved by him, it is not enough to show that on his return he was pleased with its appearance, and did not order it to be removed. The rule sanctioning payments for alterations and additions not originally contemplated, as far as the work can be traced under the contract, must be so applied as not to violate the above principles. Nor, it seems, should extra work, either in quantity or quality, unless done under an express agreement or on a statement of the price, be charged for at a greater rate in reference to the market value of such work than the contract bears to the market value of the work contracted to be done.[24]

If, however, circumstances have occurred which made the extra work more costly than it was at the time the contract was entered into, the contract price ceases to be a guide in estimating the compensation for the extra work.[25] So in a case where the plaintiff entered into a written contract with the defendants to construct a section of a canal, to receive nine cents per cubic foot for excavation, forty cents per cubic yard for rock, and eleven cents for embankment; and the defendants had so far rescinded the contract as to enable the plaintiff to recover in the form of a *quantum meruit*, the plaintiff was held at liberty to recover for excavating *hard pan* (that not being mentioned nor included in the contract), at the rate which it was worth; and to prove the value of his labor in this respect, wholly irrespective of the contract. The contract contained a

[23] *Alabama:* Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

England: Lovelock *v.* King, 1 Moo. & R. 60.

Where the contract provides that no work shall be regarded as extra work unless expressly so contracted for in writing before the work is begun, extra work done expressly as such under a parol contract must be paid for, since the parol contract is a modification of the written contract. Erskine *v.* Johnson, 23 Neb. 261, 36 N. W. 510; McLeod *v.* Genius, 31 Neb. 1, 47 N. W. 473.

[24] Jones *v.* Woodbury, 11 B. Mon. (Ky.) 167.

[25] *Indiana:* Harrison Co. *v.* Byrne, 67 Ind. 21.

Iowa: Slusser *v.* Burlington, 47 Ia. 300 (hard pan).

Michigan: Turner *v.* Grand Rapids, 20 Mich. 390 (bad state of weather).

provision that the judgment of the defendant's engineer should, in case of a difference between the parties, be conclusive; but this was held not to apply to the hard pan.[26]

Where the deviation consisted in a cheapening of the construction, it has been held that the difference in value between the parts so constructed, and constructed as the contract required, should be deducted from the contract price.[27]

If the extra work is so different from the work provided for in the contract that the price named in the contract furnishes no proper guide to the value of the extra work, or if the nature of the contract is so modified by the changes that the original prices cannot be traced in the new work, the plaintiff may recover the value of the work.[28]

II.—Rescission of Express Contract

§ 655a. Nature of rescission.

The term Rescission should legally be confined to cases where a contract is rightfully put an end to during the performance of it and before the performance is completed. This may be done by mutual consent of the parties or it may under certain circumstances be the act of one party to the contract alone. For instance, if a party is induced to enter into a contract by the fraud of the other party to it, he may avoid or

[26] Dubois *v.* Delaware & Hudson Canal Co., 4 Wend. (N. Y.) 285; s. c. 12 Wend. (N. Y.) 334; and s. c. in error, 15 Wend. (N. Y.) 87. In Alabama, see Aiken *v.* Bloodgood, 12 Ala. 221.

[27] *Alabama:* Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

Illinois: Holmes *v.* Stummel, 17 Ill. 455.

Missouri: Lindemann *v.* Dennis, 65 Mo. App. 511.

Ohio: Goldsmith *v.* Hand, 26 Oh. St. 101.

Washington: Adamant P. M. Co. *v.* Nat. Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

Therefore if a change is made at the instance of the builder and for his benefit there can be no recovery for extra work. Spence *v.* Board of Commissioners, 117 Ind. 573, 18 N. E. 513.

[28] *United States:* Charleston Ice Manuf. Co. *v.* Joyce, 63 Fed. 916, 11 C. C. A. 496.

Illinois: Chicago & Gr. W. R. R. *v.* Vosburgh, 45 Ill. 311; Western Union R. R. *v.* Smith, 75 Ill. 496; Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

Indiana: Street *v.* Swain, 21 Ind. 203.

New Hampshire: Bailey *v.* Woods, 17 N. H. 365; Wheeden *v.* Fiske, 50 N. H. 125.

New York: Hollinshead *v.* Mactier, 13 Wend. 276.

Utah: Rhodes *v.* Clute, 17 Utah, 137, 53 Pac. 990.

Wyoming: Hood *v.* Smiley, 5 Wyo. 70, 96 Pac. 856.

rescind the contract. Even if the contract was legally entered into, one party, according to most authorities, may elect to rescind the contract if full performance of it is prevented by the other party. Under some circumstances it has even been held that one party may rescind a contract because of a breach of it by the other party although it is still entirely possible for the former to continue and complete the performance on his side. In all these cases the rescission is legally accomplished because of a right given by law to the rescinding party.

Rescission, properly so called, is sometimes confounded with repudiation of the contract by one party. This, however, is an entirely improper use of the term.

Whenever a party to the contract is given the right to rescind because of a breach by the other party this is merely an optional right. He may, if he choose, continue to claim his right to the performance of the contract and may bring suit upon the special agreement and recover damages for the breach of it which will include loss of profits if any can be proved. On the other hand if he choose he may rescind the contract and claim the rights which arise from rescission.[29]

If a party to a contract elects to rescind it he cannot then continue to claim the benefits of the contract. He cannot go on and perform it nor can he claim compensation for loss of profits of it. His election involves an abandonment of any claim whatever to the performance of the contract and he can make no other claim than for a return of the benefit conferred by him.[30] Consequently, where the non-payment of an instalment under a contract is held to justify rescission, a party cannot sue for breach of the contract on such non-payment and recover for loss of profits of the contract. If he chooses to keep the contract alive, he must continue performance; but if he

[29] *Illinois:* Wilson *v.* Bauman, 80 Ill. 493.

Maryland: North *v.* Mallory, 94 Md. 305, 51 Atl. 89.

Nebraska: Thompson *v.* Gaffey, 52 Neb. 317, 72 N. W. 314.

Vermont: Derby *v.* Johnson, 21 Vt. 17.

[30] Therefore if the plaintiff continues performance after his right to rescind accrues, he cannot afterward change his mind, and claim to recover on a *quantum meruit.*

New York: Meyer *v.* Hallock, 2 Robert. 284.

Pennsylvania: Shaw *v.* Turnpike, 3 P. & W. 445.

elects to regard the contract as rescinded, he has no claim to the profits.[31]

Upon the rescission of a contract both parties to it have the right to be replaced so far as that is possible in the condition in which they were before performance of the contract began. In other words, each side is entitled to a return of anything which it has given to the other on account of the contract or in performance of it. Since one of the parties is in the wrong the other party must be preferred on both sides of this return; and if a complete return of the benefits can be made without injustice to the other party, then the return must be made to the rescinding party and not to the wrongdoing party. In most cases, however, no difficulty will be found in securing a return of benefits. If the rescinding party has been overpaid in advance, the other may recover the excess of such payments over the value of the work done before abandonment.[32]

§ 655b. Rescission for default of defendant.

According to the prevailing opinion, where there is a contract for labor, and an entire sum to be paid for it, and the plaintiff has performed a part according to its terms, and has been prevented from performing the whole by the defendant, he may sue either on the contract to recover damages for the breach of it, or in general assumpsit to recover for the value of what he has done. If he sue on the contract, he must set it forth specially, and then his damages for what he has done under it must be regulated by the contract price, and he will recover such a proportion of the whole of that price as the work he has done bears to the whole work. And in such a suit he may recover whatever other damages he may have sustained by the defendant's breach; as, for instance, if the contract were a profitable one, the profit he would have made by being allowed to complete it, and the damages he may have incurred in providing labor and means to perform the residue. If he

[31] *California:* Cox *v.* McLaughlin, 54 Cal. 605.

Illinois: Christian County *v.* Oveholt, 18 Ill. 223.

Minnesota: Beatty *v.* Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013.

New York: Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. 589; Jones *v.* N. Y., 57 App. Div. 403, 68 N. Y. Supp. 228.

[32] Watson *v.* DeWitt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

choose to waive the contract and sue in general assumpsit for work and labor, then his measure of damages will be a reasonable compensation for the work actually performed. He is not then limited to a recovery of his *pro rata* share of the agreed price.[33] So where the plaintiff had agreed with the defendants to make a section of an aqueduct, to be paid one dollar per cubic yard for rock excavation, the defendants stopped the work when about half of it was done. The plaintiff proved that he had lost on the part of the work which he had executed (that being the most expensive), estimating it at the contract price of one dollar per yard, the sum of $46,800, and that he would have made a profit on that portion of the contract which remained to be executed when the work was suspended, equal to the amount of his loss on the work done. The New York Court of Appeals, overruling the Supreme Court, held that the plaintiff should recover the actual value of the work done, without regard to the contract price.[34] Pratt, J., said:

"When parties deviate from the terms of a special contract, the contract price will, as far as applicable, generally be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfil the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth."

The Supreme Court of Ohio, in discussing this decision, dissent from these views and declare it as a rule in all cases that "the express contract furnishes the measure of damages to the

[33] *Connecticut:* Valente *v.* Weinberg, 80 Conn. 134, 67 Atl. 369, 13 L. R. A. (N. S.) 448.

Illinois: Lincoln *v.* Schwartz, 70 Ill. 134.

Michigan: Kearney *v.* Doyle, 22 Mich. 294; Cadman *v.* Markle, 76 Mich. 448.

Missouri: McCullough *v.* Baker, 47 Mo. 401.

New York: Merrill *v.* Ithaca & O. R. R., 16 Wend. 586, 30 Am. Dec. 130; Moran *v.* McSwegan, 33 N. Y. Super. Ct. 350.

North Carolina: Buffkin *v.* Baird, 73 N. C. 283.

Vermont: Chamberlin *v.* Scott, 33 Vt. 80.

[34] Clark *v.* Mayor of New York, 4 N. Y. 338, 343, 53 Am. Dec. 379, reversing 3 Barb. 288.

extent of the evidence it affords, and to the same extent as in cases where the contract continues in force, but remains neglected and unperformed by the defendant," and that this rule remains the same, notwithstanding the contract was terminated by the defendant against the plaintiff's consent.[35]

When the rescinded party to a contract has given property or has performed services either in consideration for the contract or in partial performance of it, he is entitled upon rescission, as has been seen, to a return of the property or the services. In case of property this return can often be made in specie. In case of service there can be no return in specie. Where no return can be made of the exact benefit conferred, the plaintiff is entitled to recover in an action on a *quantum meruit* or *quantum valebat,* the value of the services conferred [36] or the property given [37] in lieu of a return in specie; and since this is not a suit on the contract, but merely a recovery of the benefit conferred by performance for the purpose of replacing the parties in their original position, the contract price is immaterial,[38] and so is the value of the services to the defendant.[39] The cost to the plaintiff may be shown as evidence of

[35] Doolittle *v.* McCullough, 12 Oh. St. 360; *acc.,* Preble *v.* Bottom, 27 Vt. 249.

[36] *Georgia:* Britt *v.* Hays, 21 Ga. 157.

Illinois: Selby *v.* Hutchinson, 9 Ill. 319; Webster *v.* Enfield, 10 Ill. 298; Dobbins *v.* Higgins, 78 Ill. 440; Wilson *v.* Bauman, 80 Ill. 493.

Iowa: Fitch *v.* Casey, 2 G. Greene, 300; Marquis *v.* Lauretson, 76 Ia. 23, 40 N. W. 73; Thompson *v.* Brown, 106 Ia. 367, 67 N. W. 819.

Maryland: Black *v.* Woodrow, 39 Md. 194.

Michigan: Bush *v.* Brooks, 70 Mich. 446, 38 N. W. 562.

New York: Simmons *v.* Ocean Causeway, 21 App. Div. 30, 47 N. Y. Supp. 360; Hardiman *v.* Mayor, 21 App. Div. 614, 47 N. Y. Supp. 786.

Rhode Island: Green *v.* Haley, 5 R. I. 260.

Vermont: Preble *v.* Bottom, 27 Vt. 249.

[37] *Iowa:* Fagan *v.* Hook, 134 Ia. 381, 111 N. W. 981.

Minnesota: Bennett *v.* Phelps, 12 Minn. 326.

New York: Tabak *v.* Fettner, 139 App. Div. 248, 123 N. Y. Supp. 982.

[38] *Iowa:* Fitch *v.* Casey, 2 G. Greene, 300.

Maryland: Rodemer *v.* Hazelhurst, 9 Gill, 288; North *v.* Mallory, 94 Md. 305, 51 Atl. 89.

Massachusetts: Connolly *v.* Sullivan, 173 Mass. 1, 53 N. E. 143.

Michigan: Hemminger *v.* Western Assur. Co., 95 Mich. 355, 54 N. W. 949, 35 Am. St. Rep. 566.

Nebraska: Thompson *v.* Gaffey, 52 Neb. 317, 72 N. W. 314.

New York: Merrill *v.* Ithaca & O. R. R., 16 Wend. 586 (*cf.* Koon *v.* Greenman, 7 Wend. 121).

Vermont: Derby *v.* Johnson, 21 Vt. 17.

[39] San Francisco Bridge Co. *v.* Dum-

the value.[40] In a few States, however, the courts, overlooking the consideration that this is not a suit for breach of contract, but to recover for goods delivered or services rendered on a consideration failed, hold that the recovery must be at the contract rate,[41] or at least cannot exceed the contract price,[42] unless the circumstances are such as to show that the expense of the part performance was greater than the average expense of full performance.[43] This amounts to giving the defendant the benefit of the contract which by his default it is agreed that the plaintiff has a right to destroy.

Where the contract is divisible, so that a contract price is named for each of several acts of performance, and some of the acts have been completed before rescission, the contract price alone is recoverable for these acts; the value of the performance cannot be demanded.[44]

§ 655c. Rescission by act of God or of the law: impossibility of performance.

Where through the plaintiff's illness, or otherwise through the act of God or of the law, a contract is not completed, a recovery can be had for what is done under it to an amount measured by the value of the service, but limited by the terms of the contract.[45] So where an agent was employed to superin-

barton Land & Imp. Co., 119 Cal. 272, 51 Pac. 335 (to build a levee).

[40] Simmons *v.* Ocean Causeway, 21 App. Div. 30, 47 N. Y. Supp. 360.

[41] *Arkansas:* Wiegel *v.* Boone, 64 Ark. 228, 41 S. W. 763.

California: Reynolds *v.* Jourdan, 6 Cal. 108.

Illinois: Chicago Training School *v.* Davies, 64 Ill. App. 503; Rice *v.* Partello, 88 Ill. App. 52.

Indiana: Hoyle *v.* Stellwagen, 28 Ind. App. 681, 63 N. E. 780.

New Jersey: Kehoe *v.* Rutherford, 56 N. J. L. 23, 27 Atl. 912.

[42] *Illinois:* Folliott *v.* Hunt, 21 Ill. 654.

Missouri: Steinburg *v.* Gebhardt, 41 Mo. 519.

[43] Wellston Coal Co. *v.* Franklin Paper Co., 57 Oh. St. 182, 48 N. E. 888 (agreement to buy coal for a year at a certain rate; after coal had been received during the period of highest price, buyer repudiated; seller may recover for portion delivered at market rate).

[44] *Iowa:* Marquis *v.* Lauretson, 76 Ia. 23, 40 N. W. 73.

Maryland: Rodemer *v.* Hazlehurst, 9 Gill, 288.

See Wiegel *v.* Boone, 64 Ark. 228, 41 S. W. 763.

[45] *Georgia:* Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

Kentucky: Fuller *v.* Brown, 11 Met. 440.

Massachusetts: Harrington *v.* Fall River Iron Works, 119 Mass. 82.

Minnesota: La Du-King M. Co. *v.* La Du, 36 Minn. 473.

tend the construction of an engineering work under a contract by which he was to receive as compensation a third of the profits besides a salary, but died after the greater part of the work had been done, and it was afterwards finished at a large profit, it was held, in an action brought by his executors, that they were entitled to recover the *pro rata* proportion of the salary and of the profits under the contract, which last were measured by taking one-third of such a proportion of the whole profits earned and received by the defendant, as the cost of the work done at the time of the testator's death bore to that of the completed undertaking.[46]

In Louisiana, a contract made by a partnership as undertakers for the construction of a railroad will be cancelled by the death of any of the parties, and the other contracting party is only bound to pay the value of the work already done, and that of the materials already prepared, proportionably to the price agreed on.[47]

Where by a change of law during the progress of the work the completion of a contract is made impossible, the contractor may recover at the contract rate for the work already done.[48] And so when the full performance of work is prevented by an injunction, recovery may be had for the part performed before the injunction was issued at the contract rate, or at least according to the value of the services rendered.[49]

When one undertakes to do work upon the property of another, and before the completion of the work the property is destroyed by act of God the contractor is entitled to recover

Missouri: Callahan *v.* Shotwell, 60 Mo. 398.

New York: Jones *v.* Judd, 4 N. Y. 411; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 384.

In Fahy *v.* North, 19 Barb. 341, the recovery was held not to be governed by the contract rate. In Hubbard *v.* Belden, 27 Vt. 645; Patrick *v.* Putnam, 27 Vt. 759, the amount recovered was reduced by the damages sustained by the employer from the plaintiff's absence.

For cases of service involving this point, see *post*, § 672.

[46] Clark *v.* Gilbert, 26 N. Y. 279, 84 Am. Dec. 189.

[47] McCord *v.* West Feliciana R. R., 3 La. Ann. 285.

[48] Jones *v.* Judd, 4 N. Y. 411; Heine *v.* Meyer, 61 N. Y. 171, 20 Am. Rep. 475 (construction of a building).

[49] *Mississippi:* Whitfield *v.* Zellnor, 24 Miss. 663 (recovery of what the services were worth).

New Hampshire: Theobald *v.* Burleigh, 66 N. H. 574, 23 Atl. 367 (what the services were worth).

Vermont: Doolittle *v.* Nash, 48 Vt. 441.

compensation for the work he has done.[50] So where a contractor undertakes to do work on the defendant's building, and the building is blown down before completion of the work, the contractor may recover compensation for his work.[51] And if both sides of the contract have been partly executed before the destruction, compensation may be recovered on both sides for what has been done.[52]

So where one is to make repairs on the house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house by fire, he may recover for what he has done or furnished.[53] And on the same principle recovery may be had for labor and materials where the plaintiff had undertaken to install a heating or lighting plant in a building,[54] to

[50] See on this doctrine all the cases subsequently cited in this section.

The opposite doctrine prevails in England: Appleby *v.* Myers, L. R. 2 C. P. 651 (contract to put machinery into defendant's building). And see Brumby *v.* Smith, 3 Ala. 123; Shanks *v.* Griffin, 14 B. Mon. 153.

If it is still possible to restore and complete the work the plaintiff must do so before he will be entitled to recover compensation; as where he undertakes to erect a building on land: and it is blown or burned down before completion, the plaintiff is not thereby discharged from his obligation to perform.

Illinois: Schwartz *v.* Saunders, 46 Ill. 18.

Massachusetts: Adams *v.* Nichols, 19 Pick. 275, 31 Am. Dec. 137.

New Jersey: School Trustees *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

New York: Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

Tennessee: Galyon *v.* Ketchen, 85 Tenn. 55, 1 S. W. 508.

Texas: Weis *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38.

[51] *Illinois:* Schwartz *v.* Saunders, 46 Ill. 18.

Iowa: Garretty *v.* Brazell, 34 Iowa, 100.

[52] Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571.

[53] *Illinois:* Rawson *v.* Clark, 70 Ill. 656.

Massachusetts: Cleary *v.* Sohier, 120 Mass. 210; Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571.

New York: Niblo *v.* Binsse, 1 Keyes, 476; Hayes *v.* Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098.

Texas: Hollis *v.* Chapman, 36 Tex. 1; Weis *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38.

West Virginia: Hysell *v.* Sterling Coal & Manuf. Co., 46 W. Va. 158, 33 S. E. 95.

Wisconsin: Cook *v.* McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

[54] *Illinois:* Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581.

New York: Niblo *v.* Binsse, 1 Keyes, 476.

move a building,[55] to build a house from the defendant's materials,[56] to make gloves from the defendant's materials,[57] or to repair the defendant's vessel,[58] and the building, the materials, or the vessel is destroyed by fire before complete performance. According to the weight of authority this recovery is to be had at the contract rate, so far as this can be applied to the case.[59] In some States, however, the reasonable value of the work and materials is to be recovered, and not the *pro rata* portion of the contract price.[60] Since neither party is in fault, neither has forfeited the right to rely on the contract; and the better view therefore is to allow recovery at the contract rate.

§ 655d. Cancellation according to the terms of the contract.

When the contract contains a clause permitting one party to cancel it upon notice to the other, and the contract is so cancelled after part performance, the party who has partly performed may recover compensation for the work he has done at the contract rate.[61]

§ 655e. Rescission by mutual consent or mistake.

When a contract is rescinded after part performance by the

[55] Angus *v.* Scully, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318.

[56] Wilson *v.* Knott, 3 Humph. 473, 39 Am. Dec. 165.

[57] Labowitz *v.* Frankfort, 4 N. Y. Misc. 275, 23 N. Y. Supp. 1038.

[58] Menetone *v.* Athawes, 3 Burr. 1592.

[59] *Illinois:* Schwartz *v.* Saunders, 46 Ill. 18; Rawson *v.* Clark, 70 Ill. 656; Clark *v.* Busse, 82 Ill. 515.

Massachusetts: Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571.

New York: Niblo *v.* Binsse, 1 Keyes, 476; Hayes *v.* Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098; Labowitz *v.* Frankfort, 4 Misc. 275, 23 N. Y. Supp. 1038.

Texas: Hollis *v.* Chapman, 36 Tex. 1.

Virginia: Clark *v.* Franklin, 7 Leigh, 1.

Wisconsin: Cook *v.* McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

[60] Wilson *v.* Knott, 3 Humph. (Tenn.) 473, 39 Am. Dec. 165.

[61] *Illinois:* Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.

Massachusetts: Fitzgerald *v.* Allen, 128 Mass. 232.

New York: Dolan *v.* Rodgers, 149 N. Y. 489, 44 N. E. 167.

In Lyman *v.* Lincoln, 38 Neb. 794, 57 N. W. 531, however, where the city cancelled a contract to build an engine house under a power reserved to it in the contract, it was held that it could not thereafter use the contract price for the purpose of diminishing plaintiff's claim. Plaintiff is entitled to recover the amount of actual benefit which the city received independently of the terms of the contract.

mutual consent of the parties, a party who has partially performed the contract may in the ordinary case recover the value of such performance according to the contract price; the amount recoverable depending upon the ratio of the value of the labor and materials actually furnished to the total value of all the labor and materials which would have been required for the performance of the contract.[62] So where the contract is rescinded or avoided for the mutual mistake of the parties, either party may recover the value of his performance.[63]

If, however, the circumstances of the rescission are such as to make it clear that neither party was to have compensation, this will not be allowed. So when the plaintiff, who had contracted to build a mill, built it so badly that it was entirely useless, and by agreement of the parties the mill was entirely rebuilt, the builder was allowed to recover nothing for the first building, but was restricted to compensation for the rebuilding.[64]

III.—Express Contract Performed

§ 655f. Full performance of express contract.

Where an express contract for labor or for the delivery of goods is completely performed on the side of the contractor, leaving nothing undone but the payment of the contract price, the contractor may sue on the common counts as for a debt; but the measure of recovery is the contract price, and the plaintiff cannot recover the value of the services or the goods beyond that price.[65]

[62] *United States:* Charleston Ice Manuf. Co. *v.* Joyce, 63 Fed. 916, 11 C. C. A. 496.

Illinois: Schillo *v.* McEwen, 90 Ill. 77.

Iowa: McAfferty *v.* Hale, 24 Ia. 355.

Massachusetts: Connolly *v.* Sullivan, 173 Mass. 1, 53 N. E. 143.

New York: Delaware & H. Canal Co. *v.* Dubois, 15 Wend. 87, affirming Dubois *v.* C. Co., 12 Wend. 334.

North Carolina: Farmer *v.* Francis, 12 Ire. 282.

[63] Vickery *v.* Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

[64] Simpson *v.* McDonald, 2 Ark. 370.

[65] *United States:* Chesapeake & O. Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222; Dermott *v.* Jones, 2 Wall. 1, 17 L. ed. 762.

Delaware: Massey *v.* Greenabaum, 5 Pennew. 20, 58 Atl. 804.

Kansas: Houghton *v.* Kittleman, 7 Kan. App. 207, 52 Pac. 898.

Maryland: City & Suburban Ry. *v.* Basshor, 82 Md. 397, 33 Atl. 635; Southern Building & Loan Assoc. *v.* Price, 88 Md. 155, 42 L. R. A. 206, 41 Atl. 53.

§ 656. Acceptance of work not according to the contract.

If a contracting party does work in performance of a contract, but does not fulfil the terms of the contract, the other party by accepting the work as it was done renders himself liable to pay compensation.

And where by the terms of the contract one party on abandonment of the contract uncompleted has a right to complete it at the other's expense, the election to complete the contract involves an acceptance of the work so far as it is done, and entitles the contractor to recover compensation for the work he has done,[66] making allowance for the damages (as for delay) caused by the non-performance.[67]

Where work was done on land, as by building a house or other structure, the owner by occupying the building does not accept the work, since he cannot make use of his own land without using the building and his doing so is no waiver of his right to claim that the contract has not been performed.[68] In such a case the enforced occupation of the building by the owner is not a waiver of the condition precedent, and although the owner of the land necessarily becomes the owner also of the

Massachusetts: Morse *v.* Potter, 4 Gray, 292.

Missouri: Kick *v.* Boerste, 45 Mo. App. 134.

New York: Clark *v.* Fairchild, 22 Wend. 576; Ladue *v.* Seymour, 24 Wend. 60.

Rhode Island: McDermott *v.* St. Wilhelmina B. A. Soc., 24 R. I. 527, 54 Atl. 58.

Tennessee: Allen *v.* McNew, 8 Humph. 46.

Virginia: Baltimore & O. R. R. *v.* Polly, 14 Gratt. 447.

[66] *New York:* Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017; Watts *v.* Board of Education, 9 App. Div. 143, 41 N. Y. Supp. 141.

Wisconsin: Arndt *v.* Keller, 96 Wis. 274, 71 N. W. 651.

Contra, Sumpter *v.* Hedges, [1898] 1 Q. B. 673.

[67] *New York:* McGrath *v.* Horgan, 72 App. Div. 152, 76 N. Y. Supp. 412.

Wisconsin: Nichols *v.* Superior, 109 Wis. 643, 85 N. W. 428.

[68] *Alabama:* English *v.* Wilson, 34 Ala. 201.

Arkansas: Bertrand *v.* Byrd, 5 Ark. 651.

California: Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96, *n.;* J. M. Griffith Co. *v.* Los Angeles (Cal.), 54 Pac. 383.

Illinois: Eldridge *v.* Rowe, 7 Ill. 91, 43 Am. Dec. 41.

Kentucky: Morford *v.* Mastin, 6 T. B. Mon. 609, 17 Am. Dec. 188.

Missouri: Lowe *v.* Sinklear, 27 Mo. 308, 72 Am. Dec. 266; Yeats *v.* Ballentine, 56 Mo. 530.

New Jersey: Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

England: Munro *v.* Butt, 8 El. & Bl. 738.

structure thus attached to his freehold, and cannot be obliged to tear it down, he is nevertheless under no obligation to pay for it. The main question is whether, under the circumstances of the particular case, there has been *a voluntary acceptance by the defendant of the plaintiff's incomplete performance.* If the acceptance was involuntary, or was compelled only by the necessity of the case, or the defendant's wish to retain property of his own to which the plaintiff's work was an incident or a necessary adjunct, there is no right of recovery. The courts are, however, acute to find an acceptance even in such cases, and any act of approval is sufficient for the purpose. The measure of damages in an action on the common counts for work accepted, but not done according to the contract, should be the value of the work,[69] not exceeding the contract price,[70] with the right in the defendant to recoup damages for the nonperformance.[71] The same is true when the defendant impliedly accepts the work by seeing it performed without ob-

[69] *Alabama:* Merriweather *v.* Taylor, 15 Ala. 735; Hawkins *v.* Gilbert, 19 Ala. 54; Bell *v.* Teague, 85 Ala. 211, 3 So. 861.

Arkansas: Simpson *v.* McDonald, 2 Ark. 370.

California: Lacy Mfg. Co. *v.* Los Angeles, G. & E. Co., 12 Cal. App. 37, 106 Pac. 413.

Delaware: Webster *v.* Beebe, 77 Atl. 769.

Indiana: McClure *v.* Secrist, 5 Ind. 31, 61 Am. Dec. 74.

Missouri: Williams *v.* Porter, 51 Mo. 441.

Vermont: Viles *v.* Barre & M. T. & P. Co., 79 Vt. 311, 65 Atl. 104.

West Virginia: Baltimore & O. R. R. *v.* Lafferty, 2 W. Va. 104.

Wisconsin: Taylor *v.* Williams, 6 Wis. 363.

[70] *Maryland:* Walsh *v.* Jenvey, 85 Md. 240, 36 Atl. 817.

Michigan: Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292.

North Carolina: Farmer *v.* Francis, 12 Ired. 282.

[71] *United States:* Dermott *v.* Jones, 23 How. 220, 16 L. ed. 442.

Alabama: Sheppard *v.* Dowling, 103 Ala. 563, 15 So. 846.

Colorado: Bush *v.* Finucane, 8 Colo. 192, 6 Pac. 514.

Delaware: Webster *v.* Beebe, 77 Atl. 769.

Illinois: Adlard *v.* Muldoon, 45 Ill. 193; Estep *v.* Fenton, 66 Ill. 467.

Indiana: Epperly *v.* Bailey, 3 Ind. 72; Barkalow *v.* Pfeiffer, 38 Ind. 214.

Maine: Jewett *v.* Weston, 11 Me. 346.

Massachusetts: Bee Printing Co. *v.* Hichborn, 4 All. 63.

Michigan: Phelps *v.* Beebe, 71 Mich. 554.

Missouri: Keith *v.* Ridge, 146 Mo. 90, 47 S. W. 904.

New Hampshire: Horn *v.* Batchelder, 41 N. H. 86.

New York: Pullman *v.* Corning, 9 N. Y. 93.

Vermont: Barker *v.* Troy & Rutland R. R., 27 Vt. 766; Viles *v.* Barre & M. T. & P. Co., 79 Vt. 311, 65 Atl. 104.

jection. Thus where the contractor is in default, so that he cannot sue upon his contract, but the other party has stood by and seen him prosecute the work without objection, and been benefited by his labor and materials, the contractor is entitled to compensation to the extent of such benefit. But the profits which he might have made if he had complied with his engagement, cannot be included in his damages.[72] The law in such case implies a promise on the other's part to pay what the labor was reasonably worth, of which the special contract will furnish evidence.[73] Where work is to be done within a certain time, the employer, by allowing it to go on after the time has expired, waives his right to rescind on that account, and can only claim such damages from the employee as he may have sustained by the delay.[74] But other objections are not thereby waived.[75] Where the work accepted was in an incomplete state, the contract price is to be reduced by the sum required to complete it.[76] But where it was completed, but lacking in quality, the contract price is to be reduced by the difference in value of the work as it should have been by the contract and as it actually was.[77]

§ 657. Substantial performance.

Where a contractor performing his contract in good faith substantially complies with his obligation, but makes some comparatively slight deviation, he may recover compensation for the work done.[78]

[72] Carland *v.* New Orleans, 13 La. Ann. 43.

[73] Jewell *v.* Schroeppel, 4 Cow. 564.

[74] *California:* Lacy Mfg. Co. *v.* Los Angeles G. & E. Co., 12 Cal. App. 37, 106 Pac. 413.

New York: Sinclair *v.* Tallmadge, 35 Barb. 602.

[75] Nibbe *v.* Brauhn, 24 Ill. 268.

[76] *Arkansas:* Walworth *v.* Finnegan, 33 Ark. 751.

Connecticut: Blakeslee *v.* Holt, 42 Conn. 226.

Indiana: Manville *v.* McCoy, 3 Ind. 148.

Maine: Hayden *v.* Madison, 7 Me. 76.

Ohio: Goldsmith *v.* Hand, 26 Oh. St. 101.

Wisconsin: Arndt *v.* Keller, 96 Wis. 274, 71 N. W. 651.

[77] *United States:* The Isaac Newton, 1 Abb. Adm. 11.

Alabama: Sheppard *v.* Dowling, 103 Ala. 563, 15 So. 846.

New York: Morton *v.* Harrison, 52 N. Y. Super. Ct. 305; Walter *v.* Hangen, 71 App. Div. 40, 75 N. Y. Supp. 683.

[78] Stude *v.* Kochler (Tex. Civ. App.), 138 S. W. 193.

He cannot, strictly speaking, recover on the special contract, and therefore

While there is general agreement on this point among the authorities, the rule for determining the amount of recovery is very differently stated by the different courts. The rule most commonly laid down is that the contractor may recover the contract price less an allowance for the damage caused by the deviation.[79] In such a case where one who had contracted to build a house had slightly deviated from the contract the jury were told at the trial to consider what *the house was worth* to the defendant, and give that sum in damages. On a motion for a

if the original obligation was in the form of a covenant an action of covenant will not lie on substantial performance. Clayton *v.* Blake, 4 Ired. (N. C.) 497.

[79] *United States:* The Lucille Manor, 70 Fed. 233; Springfield Milling Co. *v.* Barnard & Leas Manuf. Co., 81 Fed. 261, 26 C. C. A. 389.

Indiana: Barkalow *v.* Pfeiffer, 38 Ind. 214.

Iowa: Ætna Iron & Steel Works *v.* Kossuth County, 79 Iowa, 40, 44 N. W. 215.

Massachusetts: Bassett *v.* Sanborn, 9 Cush. 58; Gleason *v.* Smith, 9 Cush. 484, 57 Am. Dec. 62; Kenworthy *v.* Stevens, 132 Mass. 123; Norwood *v.* Lathrop, 178 Mass. 208, 59 N. E. 650.

Minnesota: Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Missouri: Yeats *v.* Ballentine, 56 Mo. 530; Decker *v.* School District, 101 Mo. App. 115, 74 S. W. 390.

New Jersey: Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; Feeney *v.* Bardsley, 66 N. J. L. 239, 49 Atl. 443.

New York: Phillip *v.* Gallant, 62 N. Y. 256; Woodward *v.* Fuller, 80 N. Y. 312; Nolan *v.* Whitney, 88 N. Y. 648; Smith *v.* Gugerty, 4 Barb. 614; Sinclair *v.* Tallmadge, 35 Barb. 602.

Ohio: Goldsmith *v.* Hand, 26 Oh. St. 101; Johnson *v.* Slaymaker, 18 Oh. C. Ct. 104.

Pennsylvania: Chambers *v.* Jaynes, 4 Pa. 39; Danville Bridge Co. *v.* Pomroy, 15 Pa. 151; Truesdale *v.* Watts, 12 Pa. 73; Wade *v.* Haycock, 25 Pa. 382; Moore *v.* Carter, 146 Pa. 492, 23 Atl. 243; White *v.* Braddock Borough School Dist., 159 Pa. 201, 28 Atl. 136; Shires *v.* O'Connor, 4 Pa. Super. Ct. 465.

South Dakota: Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Wisconsin: Bishop *v.* Price, 24 Wis. 480.

It is generally held that the burden of bringing in evidence of the damage caused by the deviation is on the defendant.

Iowa: Fitts *v.* Reinhart, 102 Iowa, 311, 71 N. W. 227.

Minnesota: Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Pennsylvania: Filbert *v.* Philadelphia, 181 Pa. 530, 37 Atl. 545, 59 Am. St. Rep. 676.

In Massachusetts in one case the burden was thought to be on the plaintiff. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455. But this decision seems to be qualified by later cases. Vickery *v.* Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

In a few cases full recovery of the contract price upon substantial performance appears to have been allowed, but the court was probably not dealing with the question of reduction. Linch *v.* Paris Lumber & Grain Elevator Co., 80 Tex. 23, 15 S. W. 208.

See Jennings *v.* Willer (Tex. Civ. App.), 32 S. W. 24.

new trial, this was held wrong, the court saying: "The house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures." And a new trial was granted.[80] In an action for negligence in building a cellar under a house, the rule of damages is the amount in money which the value of the cellar and building falls short of what it would have been if the work had been done according to the contract. This difference includes both the cost of supplying such deficiencies as could be supplied without expense disproportioned to the value of the building, and also in the case of such as could not be so supplied, the further or independent diminution in value thereby caused.[81] In this case the action was tort, but there had been a contract, and the decision seems to be rested by the court upon the general principle in such cases.

Where work is completed, though not within the agreed time, there may be a recovery in *indebitatus assumpsit* for its value, if time is not of the essence of the contract. The special contract will furnish a rule to measure the damages. So far as performance is defective in *time*, it admits of compensation. Where there was delay in completing a steamboat within the time, the measure of damages was not what it should cost the party to hire another boat for the time, but what would be the *ordinary* hire of such a boat; and in case of defective work,

[80] Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

To the same effect are the following cases:

Iowa: Crookshank *v.* Mallory, 2 Greene, 257; Tait *v.* Sherman, 10 Ia. 60; Corwin *v.* Wallace, 17 Ia. 374.

Maine: White *v.* Oliver, 36 Me. 92.

Michigan: White *v.* Brockway, 40 Mich. 209.

Missouri: Marsh *v.* Richards, 29 Mo. 99.

New Hampshire: Wadleigh *v.* Sutton, 6 N. H. 15, 23 Am. Dec. 703; Laton *v.* King, 19 N. H. 280; Davis *v.* Barrington, 30 N. H. 517; Horn *v.* Batchelder, 41 N. H. 86.

Ohio: Kane *v.* Ohio Stone Co., 39 Oh. St. 1.

Texas: Davidson *v.* Edgar, 5 Tex. 492; Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475.

Vermont: Merrow *v.* Huntoon, 25 Vt. 9; Morrison *v.* Cummings, 26 Vt. 486.

Wisconsin: Bishop *v.* Price, 24 Wis. 480.

England: Cutler *v.* Close, 5 C. & P. 337; Thornton *v.* Place, 1 Moo. & Rob. 218.

[81] Moulton *v.* McOwen, 103 Mass. 587.

what would be the cost of repairs and the ordinary hire of a boat during the time necessary to make them.[82] If time is of the essence of the contract, a failure to complete the performance in time should prevent recovery altogether by the plaintiff.[83]

This rule is often stated more specifically in this form—that where performance substantially conforms to the contract but varies in some particulars from the specifications, the amount to be deducted from the contract price is the reasonable cost of remedying such defects as are remediable without unreasonable expenditure,[84] and so far as the defects cannot be remedied, the diminished value of the performance, compared with complete performance.[85]

It is often held, however, that the measure of recovery is the value of the performance,[86] or the amount of benefit con-

[82] Brown *v.* Foster, 51 Pa. 165.

[83] Slater *v.* Emerson, 19 How. 224, 15 L. ed. 626.

[84] *Connecticut:* Pinches *v.* Swedish Lutheran Church, 55 Conn. 183, 10 Atl. 264, 3 Am. St. Rep. 43.

Illinois: Keeler *v.* Herr, 157 Ill. 57, 41 N. E. 750.

Massachusetts: Walker *v.* Orange, 16 Gray, 193.

Michigan: Sheldon *v.* Leahy, 111 Mich. 29, 69 N. W. 76.

Minnesota: Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Missouri: Haysler *v.* Owen, 61 Mo. 270.

New York: Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608.

Pennsylvania: Pallman *v.* Smith, 135 Pa. 188, 19 Atl. 188; Shires *v.* O'Connor, 4 Pa. Super. Ct. 465.

Wisconsin: Foeller *v.* Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327, explaining and qualifying Ashland L. S. & C. Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136.

England: Cutler *v.* Close, 5 C. & P. 337.

[85] *Alabama:* Fleming *v.* Lunsford, 163 Ala. 540, 50 So. 921.

Massachusetts: Cullen *v.* Sears, 112 Mass. 299.

Michigan: Eaton *v.* Gladwell, 121 Mich. 444, 449, 80 N. W. 211.

New York: Morton *v.* Harrison, 52 N. Y. Super. Ct. 305.

Wisconsin: Foeller *v.* Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327, explaining and qualifying Ashland L. S. & C. Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136.

[86] *United States:* Woodruff *v.* Hough, 91 U. S. 596, 23 L. ed. 332.

Connecticut: Pinches *v.* Swedish Lutheran Church, 55 Conn. 183, 10 Atl. 264, 3 Am. St. Rep. 43.

Kentucky: Morford *v.* Ambrose, 3 J. J. Marsh. 688.

Maine: Norris *v.* School Dist., 12 Me. 293, 28 Am. Dec. 182; Veazie *v.* Bangor, 51 Me. 509.

Massachusetts: Smith *v.* First Cong. Meeting House, 8 Pick. 178; Lord *v.* Wheeler, 1 Gray, 282; Atkins *v.* Barnstable, 97 Mass. 428; Powell *v.* Howard, 109 Mass. 192.

Michigan: Allen *v.* McKibbin, 5 Mich. 449; Wildey *v.* School Dist., 25 Mich. 419; Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. 761.

Missouri: Williams *v.* Porter, 51

ferred on the defendant,[87] though in every case where the point is raised it is of course held that this recovery cannot exceed the contract price [88] to the benefit of which the defendant has a right,[89] deducting therefrom the damages for non-performance.[90]

The true doctrine appears to be that recovery can in no case exceed the contract price less proper allowance for the defective performance; nor on the other hand can it exceed the benefit conferred.[91] Since the plaintiff has not exactly performed his contract he cannot justly claim the benefit of any profit that would have come to him by performing it; and on the other hand the defendant is entitled to be left in no worse position than he would have occupied had the contract been performed, and therefore should be held to pay no more than the contract price less the allowance for non-performance.

IV.—Express Contract Unperformed

§ 658. Abandonment or substantial non-performance of contract.

Where the contract is, on its face, an entire one, and has

Mo. 441; Freeman *v.* Aylor, 62 Mo. App. 613; Decker *v.* School Dist., 101 Mo. App. 115, 74 S. W. 390.

Ohio: Newman *v.* McGregor, 5 Ohio, 349, 24 Am. Dec. 293.

[87] *Arkansas:* Bertrand *v.* Byrd, 5 Ark. 651.

Maryland: Walsh *v.* Jenvey, 85 Md. 240, 36 Atl. 817.

Massachusetts: Bassett *v.* Sanborn, 9 Cush. 58; Cardell *v.* Bridge, 9 Allen, 355; Norwood *v.* Lathrop, 178 Mass. 208, 59 N. E. 650.

[88] *Connecticut:* Pinches *v.* Swedish Lutheran Church, 55 Conn. 183, 10 Atl. 264, 3 Am. St. Rep. 43.

Kentucky: Morford *v.* Ambrose, 3 J. J. Marsh. 688.

Maryland: Walsh *v.* Jenvey, 85 Md. 240, 36 Atl. 817.

Massachusetts: Atkins *v.* Barnstable, 97 Mass. 428; Powell *v.* Howard, 109 Mass. 192.

[89] Ætna S. & I. Works *v.* Kossuth County, 79 Ia. 40, 44 N. W. 215.

[90] *Kentucky:* Escott *v.* White, 10 Bush, 169.

Michigan: Allen *v.* McKibbin, 5 Mich. 449; Wildey *v.* School District, 25 Mich. 419; Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. 761; Germain *v.* Union School Dist., 158 Mich. 214, 122 N. W. 524.

Missouri: Freeman *v.* Aylor, 62 Mo. App. 613; Decker *v.* School Dist., 101 Mo. App. 115, 74 S. W. 390.

[91] *Massachusetts:* Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455. This, however, has been explained not to mean that where a useless building is built the rule would give the contractor nothing because the total value of the land was not increased by the building; the benefit conferred is the value of the structure in itself, without regard to whether it is useful where the defendant had it placed. See Vickery *v.* Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

Missouri: Yeats *v.* Ballentine, 56 Mo. 530.

been performed only in part, a substantial portion of the contract being left unperformed; or where, after substantial performance, the contractor wilfully and without excuse abandons further performance, compensation is sometimes sought for what has been actually done.[92] * Such are cases of agreements to work for a specified time for a given sum, where the party employed quits his employment without the consent of the other, and before the period fixed; agreements to deliver a certain quantity of goods, and delivery of only a part; agreements to do work, as building, for instance, according to certain specifications, where the work is done, but the specifications are departed from; whether in these cases the party failing to perform his agreement strictly has any redress whatever, and to what extent, is a very delicate and much vexed question, which perhaps more properly belongs to the subject of the right of action than that of the measure of damages. The better and sounder rule would seem to be, that unless there is a waiver of the privileged performance, or an acceptance of the partial performance, there can be no recovery. In cases of this kind, where the plaintiff is held entitled to recover anything, the agreement of the parties, not having been completely performed, cannot be conclusive as to the remuneration. Other evidence must be resorted to, and other considerations affect the result. Still, the contract to a certain extent furnishes the measure of remuneration.** As to the right to recover, the authorities are in conflict.

§ 659. Jurisdictions refusing recovery.

According to the better view, in the case of an entire executory contract, which the plaintiff without legal excuse has failed to fulfil on his part, he can recover nothing, either on the contract itself or on a *quantum meruit*. Some courts have refused in such case to modify the contract of the parties, or substitute another by sanctioning a recovery to any extent.[93] In the case

[92] Campbell *v.* Gates, 10 Pa. 483.

[93] *United States:* Dermott *v.* Jones, 2 Wall. 1, 17 L. ed. 762.

California: Hutchinson *v.* Wetmore, 2 Cal. 310, 56 Am. Dec. 337.

Maryland: Gill *v.* Vogler, 52 Md. 663.

Massachusetts: Olmstead *v.* Beale, 19 Pick. 528; Veazie *v.* Hosmer, 11 Gray, 369.

Mississippi: Wooten *v.* Read, 2 Sm. & M. 585.

Missouri: Posey *v.* Garth, 7 Mo. 94,

of Smith *v.* Brady [94] the subject is fully discussed, and the principle applied to the case of a contract by a builder to erect a building (for which he is to be paid on its completion) on another's land, according to certain specifications, between which and the building as erected there is a substantial disagreement.

§ 660. Jurisdictions allowing recovery—Britton v. Turner.

Recovery was first allowed in such cases in the leading case of Britton *v.* Turner.[95] In an action for work and labor, it ap-

37 Am. Dec. 183; Caldwell *v.* Dickson, 17 Mo. 575; Schnerr *v.* Lemp, 19 Mo. 40.

New York: Champlin *v.* Rowley, 18 Wend. 187, 31 Am. Dec. 376; Pullman *v.* Corning, 9 N. Y. 93; Lawson *v.* Hogan, 93 N. Y. 39; Neville *v.* Frost, 2 E. D. Smith, 62.

Ohio: Allen *v.* Curles, 6 Oh. St. 505; Larkin *v.* Buck, 11 Oh. St. 561.

Pennsylvania: Martin *v.* Schoenberger, 8 W. & S. 367; Bryant *v.* Stilwell, 24 Pa. 314.

Vermont: Jones *v.* Marsh, 22 Vt. 144 (followed, as to law in Vermont, in Jordan *v.* Fitz, 63 N. H. 227).

England: Cutter *v.* Powell, 6 T. R. 320; Sinclair *v.* Bowles, 9 B. & C. 92; Kingdom *v.* Cox, 5 C. B. 522.

This is the case when there is a voluntary abandonment of the contract without excuse:

United States: Hansbrough *v.* Peck, 5 Wall. 497, 18 L. ed. 520.

Alabama: Hawkins *v.* Gilbert, 19 Ala. 54.

California: Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Maryland: Denmead *v.* Coburn, 15 Md. 29.

Massachusetts: Homer *v.* Shaw, 177 Mass. 1, 58 N. E. 160.

New York: Jennings *v.* Camp, 13 Johns. 94, 7 Am. Dec. 367; Brown *v.* Weber, 38 N. Y. 187; Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; Crane *v.* Knubel, 61 N. Y. 645; Cunningham *v.* Jones, 4 Abb. Pr. 433.

So where the work is completed, but fails in some substantial particular to comply with the requirements of the contract:

Minnesota: Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

New Jersey: Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; Feeney *v.* Bardsley, 66 N. J. L. 239, 49 Atl. 443.

New York: Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449.

Ohio: Mehurin *v.* Stone, 37 Oh. St. 49.

Pennsylvania: Shires *v.* O'Connor, 4 Pa. Super. Ct. 465.

South Dakota: Hulst *v.* Benevolent Hall Assoc., 9 S. D. 144, 68 N. W. 200.

England: Ellis *v.* Hamlen, 3 Taunt. 52; Whitaker *v.* Dunn, 3 T. L. Rep. 602.

Canada: Sherlock *v.* Powell, 26 Ont. App. 407.

It seems that if the contractor upon abandonment forfeits his right to compensation, this is an end to rights on the contract for either party. The owner cannot sue the contractor for damages for non-performance without making allowance for the work done by the contractor. Griffin *v.* Miner, 54 N. Y. Super. Ct. 46.

[94] 17 N. Y. 173, 72 Am. Dec. 442.

[95] 6 N. H. 481, 488, 26 Am. Dec. 713.

peared that the plaintiff had agreed to work for the defendant one year for a given sum, and that before the expiration of the time agreed on he had quitted his service without the defendant's consent, and on this he was held entitled to recover for the time he was employed. Parker, C. J., after commenting on the extreme disagreement and want of harmony among the cases, and calling particular attention to those where a recovery had been allowed on partial performance of agreements to build, proceeded to say:

"We hold, then, where a party undertakes to pay upon a special contract for the performance of labor or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

"In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreements, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it.

"But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to recover on his new case for the work done, not as agreed, yet accepted by the defendant.

"If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done

toward the performance. He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay; because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay.

"But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time, until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent. . . . The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he received upon the whole transaction; and in estimating the value of the labor, the contract price for the service cannot be exceeded."

The case of Britton *v.* Turner has been followed, with more or less modification, in perhaps a majority of the jurisdictions in this country.[96]

[96] *Indiana:* McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470, *n.*, by which the prior cases of Swift *v.* Williams, 2 Ind. 365, and Hoagland *v.* Moore, 2 Blackf. 167, are overruled as to the point in question.

Iowa: Barr *v.* Van Duyn, 45 Ia. 228.

Kansas: Duncan *v.* Baker, 21 Kan. 99.

Michigan: Wilson *v.* Wagar, 26 Mich. 452; Begole *v.* McKenzie, 26 Mich. 470; Keystone L. & S. M. Co. *v.* Dole, 43 Mich. 370; Fuller *v.* Rice, 52 Mich. 435.

Missouri: Downey *v.* Burke, 23 Mo. 228, Barcus *v.* Hannibal R. C. & P. P. R., 26 Mo. 102; Marsh *v.* Richards, 29 Mo. 99.

Nebraska: Parcell *v.* McComber, 11 Neb. 209, 38 Am. Rep. 366.

North Carolina: Gorman *v.* Bellamy, 82 N. C. 496.

Oregon: Steeples *v.* Newton, 7 Ore. 110, 83 Am. Rep. 705.

Tennessee: Jones *v.* Jones, 2 Swan, 605.

Texas: Carroll *v.* Welch, 26 Tex. 147. The cases in which this doctrine is laid down are usually cases where the work was completed, but there were serious defects in it.

Kentucky: Nance *v.* Patterson Building Co., 140 Ky. 564, 131 S. W. 484.

§ 661. Rule in Vermont.

In Vermont the right of recovery seems to turn, not only where the contract is substantially performed, but in all cases, not on the plaintiff's voluntary acceptance, but on the benefit supposed to be conferred by the work done. In the case of Kelly *v.* Bradford,[97] Aldis, J., delivering the opinion of the Supreme Court of that State, says:

"Where a contract has been substantially though not strictly performed—where the party failing to perform according to the terms of his contract has not been guilty of a voluntary abandonment or wilful departure from the contract, has acted in good faith, intending to perform the contract according to its stipulations, but has failed in a strict compliance with its provisions, and where from the nature of the contract, and of the labor performed, the parties cannot rescind and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other,—in such case the party failing to perform his contract strictly, may recover of the other as upon a *quantum meruit* for such a sum only as the contract as performed has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work."

Missouri: Heman *v.* Compton Hill Imp. Co., 58 Mo. App. 480; Muller *v.* Gillick, 66 Mo. App. 500.

New Hampshire: Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.

North Carolina: Twitty *v.* McGuire, 3 Murph. 501.

Tennessee: Cox *v.* Estell, Peck, 175; Elliott *v.* Wilkinson, 8 Yerg. 411; Porter *v.* Woods, 3 Humph. 56, 39 Am. Dec. 153; Gibson *v.* Carlin, 13 Lea, 440; Deberry *v.* Young, 1 Tenn. Cas. 51; Bush *v.* Jones, 2 Tenn. Cas. 224.

Texas: Gonzales College *v.* McHugh, 21 Tex. 256.

But in many States, the plaintiff is allowed to recover if his work has been of actual benefit to the defendant, even though he has intentionally abandoned the work before completion and without excuse.

Arkansas: Walworth *v.* Finnegan, 33 Ark. 751.

Maine: Jewett *v.* Weston, 11 Me. 346; Norris *v.* School District, 12 Me. 292, 28 Am. Dec. 182.

Tennessee: Porter *v.* Woods, 3 Humph. 56, 39 Am. Dec. 153.

Texas: Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Gonzales College *v.* McHugh, 21 Tex. 256; Carroll *v.* Welch, 26 Tex. 147; Watson *v.* DeWitt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

West Virginia: Baltimore & O. R. R. *v.* Lafferty, 2 W. Va. 104.

The rule is otherwise in Vermont (*infra*, § 661) and in Kentucky. Escott *v.* White, 10 Bush (Ky.), 169.

[97] 33 Vt. 35.

And the rule by which compensation is to be made for the partial performance of the contract, is thus declared:

"The party failing to perform must first deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; or where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and insufficiency of the materials, so that he shall in this respect be made as good, pecuniarily, as if the contract had been strictly performed. 2d. Whatever additional damages his breach of the contract may have occasioned to the other."

Later decisions firmly maintain in that State the same *quasi* equitable doctrine in actions at law, holding that where the stipulations are not in the nature of conditions precedent, a party who but partly fulfils his contract may recover for what has been done under it to the extent that such partial performance has benefited the other.[98] So in the same State, where one agrees to work for another a certain time, he can maintain an action for his compensation without making up time he has reasonably lost during the period, and the time so lost will be deducted.[99]

If however the plaintiff voluntarily abandoned the contract before completing performance, he is not allowed to recover.[100]

§ 662. Measure of recovery.

But the party in default must not gain by his default, nor the other lose by it. Parties often agree to give excessive prices to have an entire contract literally performed, when a partial performance would never have been contracted for. And though the contract price, as far as practicable and equitable, furnishes the measure of damages on such a *quantum meruit*, and the defaulting party can in no case recover more, yet he can have his

[98] Dyer *v.* Jones, 8 Vt. 205; Gilman *v.* Hall, 11 Vt. 510, 34 Am. Dec. 700; Brackett *v.* Morse, 23 Vt. 554; Merrow *v.* Huntoon, 25 Vt. 9; Morrison *v.* Cummings, 26 Vt. 486; Hubbard *v.* Belden, 27 Vt. 645; Barker *v.* Troy & Rutland R. R., 27 Vt. 766; Kettle *v.* Harvey, 21 Vt. 301; Swift *v.* Harriman, 30 Vt. 607; Smith *v.* Foster, 36 Vt. 705.

[99] McDonald *v.* Montague, 30 Vt. 357.

[100] Kettle *v.* Harvey, 21 Vt. 301; Austin *v.* Austin, 47 Vt. 311. Unless, indeed, where the contract is divisible, he may recover for the portion of it that has been completely performed, deducting damages for non-performance of the remainder. Booth *v.* Tyson, 15 Vt. 515.

quantum meruit only, and is not entitled to the contract price for what is worth less.[101] The mode of ascertaining the real benefit received from the part performance of work, in such case, is to estimate the whole work at the price fixed by the contract, and to deduct from that the amount requisite to complete the part of the work left unfinished. If any loss is occasioned by the unfinished part costing more in proportion than the whole was undertaken for, the loss must be borne by the party who originally contracted to do the whole. The amount to be allowed may in some cases be less than the proportion which the work done would bear to the cost of the whole, but cannot exceed it.[102]

The rule is sometimes less perfectly stated in the form that the plaintiff may recover the benefit which he conferred on the defendant.[103] The better form of statement is that the plaintiff is entitled to recover the value of the benefit conferred on the defendant, not however exceeding the contract price, reduced by any damages occasioned by failure properly to perform.[104]

§ 663. Recovery by an infant.

An infant who serves under a contract which he has a right

[101] *Illinois:* Clement *v.* State Reform School, 84 Ill. 311.

Michigan: Allen *v.* McKibbin, 5 Mich. 449.

[102] *Arkansas:* Walworth *v.* Finnegan, 33 Ark. 751.

Illinois: Dobbins *v.* Higgins, 78 Ill. 440.

Indiana: McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

Maine: Jewett *v.* Weston, 11 Me. 346.

Michigan: Keystone L. & S. M. Co. *v.* Dole, 43 Mich. 370; Fuller *v.* Rice, 52 Mich. 435.

Missouri: Barcus *v.* Hannibal R. C. & P. P. R., 26 Mo. 102; Marsh *v.* Richards, 29 Mo. 99.

New Hampshire: Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.

North Carolina: Twitty *v.* McGuire, 3 Murph. 501.

Tennessee: Porter *v.* Woods, 3 Humph. 56, 39 Am. Dec. 153; Gibson *v.* Carlin, 13 Lea, 440; Bush *v.* Jones, 2 Tenn. Cas. 224.

Texas: Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Gonzales College *v.* McHugh, 21 Tex. 256; Watson *v.* DeWitt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

[103] *Maine:* Norris *v.* School Dist., 12 Me. 293, 28 Am. Dec. 182.

Tennessee: Elliott *v.* Wilkinson, 8 Yerg. 411.

[104] *Missouri:* Heman *v.* Compton Hill Imp. Co., 58 Mo. App. 480; Muller *v.* Gillick, 66 Mo. App. 500.

New Hampshire: Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.

Tennessee: Deberry *v.* Young, 1 Tenn. Cas. 51.

Texas: Carroll *v.* Welch, 26 Tex. 147.

to repudiate may recover upon such repudiation the value of his services.[105]

In Vermont it has been held, in accordance with the rule in that State, that when an infant makes a contract with an adult to serve for a given time, and leaves before he has performed the whole of the service, he is entitled to recover what his services are reasonably worth, taking into consideration the injury to the other.[106] But in Maine it has been held that a minor who has agreed to work for a certain time, and not to leave without giving notice a certain time beforehand, but does not complete the agreed term, and does not give the notice, is not liable to have the damages thereby occasioned deducted from the amount he would otherwise recover, the minor not being bound by his contract.[107]

[105] *Post*, § 673*a*.

[106] Hoxie *v.* Lincoln, 25 Vt. 206; *acc.*, Moses *v.* Stevens, 2 Pick. 332; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580; Hagerty *v.* Nashua Lock Co., 62 N. H. 576.

[107] Derocher *v.* Continental Mills, 58 Me. 217, 4 Am. Rep. 286.

CHAPTER XXXI

CONTRACTS OF SERVICE

§ 664. Compensation for services performed.
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675a. The English workmen's compensation act.

§ 664. Compensation for services performed.

If a servant fully performs his contract, but the contract allows him no definite compensation, he is allowed to recover on a *quantum meruit* the value of the services performed,[1] without regard to the amount of benefit which the principal or master received from them.[2] If the contract fixes the compensation, that amount is the sole measure of damages,[3] so that the recovery cannot exceed the agreed amount,[4] nor on the

[1] *Ante*, § 650.

[2] *Massachusetts:* Stowe *v.* Buttrick, 125 Mass. 449.

Ohio: Bagley *v.* Bates, Wright, 705.

[3] *United States:* Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463.

Missouri: Crump *v.* Rebstock, 20 Mo. App. 37; Pim *v.* Greer, 64 Mo. App. 175 (agreement on amount after work done was binding, and superseded the *quantum meruit*).

New York: Fells *v.* Vestvali, 2 Keyes, 152.

[4] Sherman *v.* Mayor, 1 N. Y. 316. Staderman *v.* Heins, 78 App. Div. 563, 79 N. Y. Supp. 674, was an action on a contract by which plaintiff agreed to serve the intestate as nurse. The

other hand can the defendant reduce the agreed amount by showing that the services were worth less.[5] Where the payment for the services was by the agreement to be made by the delivery of commodities, the plaintiff is entitled to recover no more than the value of the commodity to be delivered at the time fixed by the contract for the delivery;[6] but where the wages are fixed in money, with an option to pay in commodities, the master who has not exercised the option must upon suit pay in money.[7]

In a case in Minnesota, where by the contract the defendant was to fix the amount of compensation, the court refused to give more than the amount fixed by the defendant;[8] but in Illinois such a contract was held to be equivalent to a contract to pay a reasonable compensation, and the plaintiff was allowed to recover on a *quantum meruit*,[9] and in Ohio the court, without deciding this point, held that if the employer did not fix the value of the services at the termination of the employment he could not do so later, at the trial of the case, but the jury should find the reasonable value of the services.[10]

Where the plaintiff began to perform the services under an express contract, and continued after the period named in the

agreement was for a dollar a day. After services had been rendered for some time the deceased signed papers stating her desire that plaintiff should receive 250 dollars. Held, that since a stipulated price of one dollar a day was proved, that alone could be recovered.

[5] Ludlow *v.* Dole, 62 N. Y. 617.

[6] *Indiana:* State *v.* Beard, 1 Ind. 460 (canal scrip).

Kentucky: Owens *v.* Durham, 5 Dana, 536 (share of crop; cannot recover enhanced value at time of subsequent demand).

Missouri: Gibson *v.* Whip Pub. Co., 28 Mo. App. 450 (shares of stock: if corporation unsuccessful, damages are nominal).

[7] *Nebraska:* Culbertson I. & W. P. Co. *v.* Wildman, 45 Neb. 663, 63 N. W. 947, 56 Am. St. Rep. 565 (wages $100 per month, $60 in cash and $40 in water rights. The servant, not being paid, could recover $100, since the option to pay him in water rights had not been exercised).

Pennsylvania: McDonald *v.* Liggett, 146 Pa. 460, 23 Atl. 338. (Contract by which plaintiff performed services in procuring an oil lease and was to be paid by an interest in the lease or $200. The lease was procured, but defendant did nothing under it. Since he had not exercised his option the plaintiff was entitled to compensation for his services at the value fixed by the defendant himself.)

[8] Butler *v.* Winona M. Co., 28 Minn. 205, 41 Am. Rep. 277.

[9] Van Arman *v.* Byington, 38 Ill. 443.

[10] *Ohio:* Toledo, A. A. & N. M. Ry. *v.* Lott, 10 Ohio C. Ct. 249.

contract, he was held entitled to compensation at the contract rate; [11] and the other terms, such as the duration of the employment, are presumed to continue as in the contract.[12] If, however, there is any change in the relation of the parties, there is no presumption that the rate of compensation continues. Thus the old rate of wages does not continue when the character of the service is changed,[13] or if an interval elapses between the terms of employment,[14] or if the servant continues in the employment after receiving a notice of a change in the rate of wages.[15]

Where it is claimed that services were rendered under an express contract the burden of proving such a contract is upon the defendant, since the plaintiff who claims to recover the value of the services on the *quantum meruit* proves a *prima facie* case by proving that the services were rendered at request.[16] When there is a dispute as to the price agreed to be paid in the

[11] *Arkansas:* Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

California: Nicholson *v.* Patchin, 5 Cal. 474.

Illinois: Grover & B. S. M. Co. *v.* Bulkley, 48 Ill. 189; Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026, 22 Am. St. Rep. 515; Crane Bros. Manuf. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030; Glucose Sugar Refining Co. *v.* Flinn, 184 Ill. 123, 56 N. E. 400.

Maryland: Travelers' Ins. Co. *v.* Parker, 92 Md. 22, 37 Atl. 1042.

New Hampshire: New Hampshire Iron Factory Co. *v.* Richardson, 5 N. H. 294.

New York: Huntingdon *v.* Claffin, 38 N. Y. 182; Vail *v.* Jersey Little Falls Manuf. Co., 32 Barb. 564; Adams *v.* Fitzpatrick, 56 N. Y. Super Ct. 580.

Ohio: Kelly *v.* Carthage Wheel Co., 62 Oh. St. 598, 57 N. E. 984.

Pennsylvania: Wallace *v.* Floyd, 29 Pa. 184, 72 Am. Dec. 620; Ranck *v.* Albright, 36 Pa. 367.

Wisconsin: Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W. 362; Dickinson *v.* Norwegian Plow Co., 101 Wis. 157, 76 N. W. 1108.

It has been held in Minnesota that there is no presumption of the renewal of a contract void by the statute of frauds. Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846.

[12] *Michigan:* Sines *v.* Superintendents of the Poor, 58 Mich. 503, 25 N. W. 485.

Ohio: Kelly *v.* Carthage Wheel Co., 62 Oh. St. 598, 57 N. E. 984.

Wisconsin: Dickinson *v.* Norwegian Plow Co., 101 Wis. 157, 76 N. W. 1108.

England: Beeston *v.* Collyer, 4 Bing. 309.

Contra, Tucker *v.* Philadelphia & R. C. & I. Co., 53 Hun, 139, 6 N. Y. Supp. 134 (new hiring is at will).

[13] *Arkansas:* Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

Illinois: Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026, 22 Am. St. Rep. 515.

[14] Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026, 22 Am. St. Rep. 515.

[15] Crane Bros. Manuf. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030.

[16] *California:* Pendleton *v.* Cline, 85 Cal. 142, 24 Pac. 659.

Illinois: Howard *v.* Gobel, 62 Ill. App. 497.

express contract, evidence of the value of the work or of the reasonable or customary compensation may be offered as bearing on the issue.[17]

§ 664a. Evidence of value of services.

In order to determine the value of services the plaintiff is entitled to introduce such evidence as is admissible for the purpose under the rules of evidence. The nature and circumstances of the employment may be shown in order to indicate their value.[18] Thus, facts which make the circumstances peculiarly difficult may be shown,[19] and on the other hand evidence may be introduced that the work was improperly and inefficiently done.[20] Expert evidence of the value may be introduced.[21] It is usually held that such evidence is introduced subject to the judgment of the jury, and that the jury may if it choose find a value for the services different from the value stated in the opinion of the witness or even when there has been no opinion evidence as to the value.[22]

[17] *Nebraska:* Spurck *v.* Dean, 49 Neb. 66, 68 N. W. 375.

New Hampshire: Swain *v.* Cheney, 41 N. H. 232.

See Crump *v.* Rebstock, 20 Mo. App. 37.

[18] Peters *v.* Craig, 6 Dana (Ky.), 307, 32 Am. Dec. 92 (services of artist known not to be skilful; plaintiff held entitled to such compensation as is reasonable considering his lack of skill); Chiles *v.* Craig, 4 Dana (Ky.), 544 (services for nursing deceased, who had expressed the desire that they should be liberally compensated; this must be considered in determining reasonable remuneration which, however, cannot go beyond compensation).

[19] *Missouri:* Crowe *v.* Gallenkamp, 58 Mo. App. 396 (nursing cancer patient in plaintiff's house; plaintiff cannot show effect of stench on value of house, though it would affect value of services).

New York: Reynolds *v.* Robinson, 64 N. Y. 589 (nursing cancer patient; plaintiff may show stench and its effect on his health, not in order to recover for loss of health, but to prove nature of services).

Ohio: Berry *v.* Collins, 9 Ohio C. Ct. 656 (services as housekeeper; plaintiff may show bad condition of house).

[20] Farnsworth *v.* Garrard, 1 Camp. 38.

[21] McCollum *v.* Seward, 62 N. Y. 316; Reynolds *v.* Robinson, 64 N. Y. 589 (physician may testify as to value of services as nurse); Mercer *v.* Vose, 67 N. Y. 56; Seymour *v.* Fellows, 77 N. Y. 178; Keenan *v.* Getsinger, 1 App. Div. 172, 37 N. Y. Supp. 826 (physician may testify as to value of services as nurse); Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563 (services of unusual kind).

[22] *Kentucky:* Craig *v.* Durrett, 1 J. J. Marsh. 365.

Ohio: Hossler *v.* Trump, 62 Oh. St. 139, 56 N. E. 656.

But in Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597, the court held that

When the plaintiff presents an account charging a certain amount for his services, and the account is not accepted or paid, he is not thereby precluded from recovering a larger amount if the jury find that his services were worth more than the amount of his charge.[23]

Evidence of the charges of other persons for similar services (at least where they are not customary charges) cannot be shown; [24] as for instance the amount paid to one employed in the plaintiff's place.[25]

§ 665. Damages for wrongful discharge.

The general rule in cases of wrongful discharge of a servant by the master is that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recoup whatever the plaintiff might during the period have reasonably earned.[26]

The agent or servant who has been wrongfully discharged may in fact choose one of three courses.[27] First, he may con-

the jury could not disregard the expert evidence, that being the only evidence of value offered.

[23] *New York:* Williams *v.* Glenny, 16 N. Y. 389; Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Sherwood *v.* Hauser, 94 N. Y. 626.

Wisconsin: Brauns *v.* Green Bay, 78 Wis. 81, 46 N. W. 889.

But see *contra,* Daniels *v.* Wilber, 60 Ill. 526.

[24] *Iowa:* Forey *v.* Western Stage Co., 19 Iowa, 535.

New York: Lyon *v.* Valentine, 33 Barb. 271.

In Cullen *v.* Gallagher, 15 N. Y. Misc. 146, 36 N. Y. Supp. 468, a suit in which a contractor sued to recover on a *quantum meruit* for work done in cutting stone, no direct evidence of value of the work having been offered the plaintiff was allowed to show what amount he paid his workmen for doing the work.

[25] Scott *v.* Wight, 138 Ill. App. 105 (deputy county treasurer).

[26] See the cases collected and examined in the next two sections.

In a few early English cases the court took a different view, and asserted the right of the jury to fix the amount of compensation due the plaintiff. Smith *v.* Thompson, 8 C. B. 44; Richardson *v.* Mellish, 2 Bing. 229. But these cases are illustrations of an obsolete view. Actions of this sort are for breach of contract, and the damages are fixed by rules of law.

[27] *Georgia:* Rogers *v.* Parham, 8 Ga. 190; Beck *v.* Thompson, 108 Ga. 242, 33 S. E. 894.

New York: Colburn *v.* Woodworth, 31 Barb. 381; Banta *v.* Banta, 84 App. Div. 138, 82 N. Y. Supp. 113.

Tennessee: Jones *v.* Jones, 2 Swan, 605.

If he elects to sue at once he must recover compensation once for all. If he is allowed only partial compensation and accepts it without appeal, he is barred from subsequent suit. Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381.

sider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked.[28] Second, he may wait until the end of the term, and then sue for the full amount, less any sum which the defendant may have a right to recoup.[29] Third, he may sue at once for breach of

[28] *Alabama:* Fowler *v.* Armour, 24 Ala. 194, 60 Am. Dec. 459.

Hawaii: Hanuu *v.* Williams, 2 Hawaii, 233.

Maryland: Bull *v.* Schuberth, 2 Md. 57.

New Hampshire: Clark *v.* Manchester, 51 N. H. 594.

North Carolina: Brinkley *v.* Swicegood, 65 N. C. 626.

South Carolina: Watts *v.* Todd, 1 McMull. 26.

Tennessee: Glasgow *v.* Hood, 57 S. W. 162 (limited to *pro rata* share of contract price).

Vermont: Green *v.* Hulett, 22 Vt. 188; Chamberlin *v.* Scott, 33 Vt. 80 (not limited to *pro rata* share of contract price).

England: Planche *v.* Colburn, 8 Bing. 14.

When a portion of the compensation is to be paid in some other way than in money, and the employer wrongly discharges the servant before such other compensation is earned, the latter may sue for the value of his services over and above the money paid him.

In Woodberry *v.* Warner, 53 Ark. 488, 14 S. W. 671, the defendant contracted to employ plaintiff as pilot of a river-boat for a certain amount, and also agreed to convey half the boat as soon as its earnings amounted to $8,000. Defendant sold the boat before she earned $8,000. It was held that if the amount named in money was less than a reasonable salary, plaintiff could recover the reasonable salary during the time he worked.

In Adams *v.* Pugh, 7 Cal. 150, 68 Am. Dec. 233, the plaintiff was employed by partners with the agreement that he was to draw only part of the salary agreed on and that the remainder should remain in the hands of the firm until a certain amount should be accumulated, when plaintiff was to be received as partner. The partnership was dissolved before the balance accumulated reached the given amount. It was held that since defendant had prevented the performance of this contract the plaintiff could recover the remainder of the salary on account for work and labor.

[29] *Alabama:* Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Holloway *v.* Talbot, 70 Ala. 389.

California: Webster *v.* Wade, 19 Cal. 291, 79 Am. Dec. 218.

Delaware: Hitchens *v.* Sussex School Dist., 5 Pennew. 325, 62 Atl. 897.

Massachusetts: Murdock *v.* Phillips Academy, 12 Pick. 244.

Pennsylvania: Schnuth *v.* Aber, 13 Pa. Super. Ct. 174.

Wyoming: Dunn *v.* Hereford, 1 Wyo. 206.

England: Callo *v.* Brouncker, 4 C. & P. 518.

If the wages are payable in instalments, he may sue at the end of each instalment period, and recover the wages then due. McMullan *v.* Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409.

And he may then sue again for subsequent instalments.

Georgia: Blun *v.* Holitzer, 53 Ga. 82.

Missouri: Higgins *v.* Breen, 9 Mo. 493.

Where he sued for the first instalment only after two were due, he could

the contract of employment. This is the course ordinarily pursued.[30] Not all these courses, however, are open to the plaintiff in every jurisdiction. In many States he is not allowed to treat the contract as rescinded.[31] And in some States he cannot wait until the end of the term and then recover the contract price, upon showing readiness to perform, but must bring suit upon the breach created by the discharge, and recover such damages only as are consequent upon that; in other words, he is restricted to the third course.[32] Where, at the time of the wrongful discharge, no services have been performed under the contract that have not been paid for, it has been held in several cases by the Court of Common Pleas for

sue thereafter for a subsequent instalment, but not for the second, which was due when he sued. Smith *v.* Cashie & C. R. & L. Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. He can recover such instalments only as are due at the date of the writ, not those also which fall due before the time of trial. Hamlin *v.* Race, 78 Ill. 422.

And he cannot recover for any period during which he had employment elsewhere. Culbertson Irr. & W. P. Co. *v.* Wildman, 45 Neb. 663, 63 N. W. 947, 50 Am. St. Rep. 565.

It is not necessary that he should present himself to defendant and offer to perform services. If he was ready and willing to perform the services, and made reasonable efforts to obtain other employment, that is enough. McMullan *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663.

[30] *Alabama:* Davis *v.* Ayres, 9 Ala. 292; Martin *v.* Everett, 11 Ala. 375.

Colorado: Manger *v.* Grodnick, 3 Colo. App. 534, 34 Pac. 688.

Illinois: Chiles *v.* Belleville Nail Mill Co., 68 Ill. 123.

Massachusetts: Jewett *v.* Brooks, 134 Mass. 505; Paige *v.* Barrett, 151 Mass. 67, 23 N. E. 725.

Mississippi: Pritchard *v.* Martin, 27 Miss. 305.

New York: Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. Supp. 787.

Texas: Nations *v.* Cudd, 22 Tex. 550; G. A. Kelly Plow Co. *v.* London, (Tex. Civ. App.), 125 S. W. 974.

In Park *v.* Independent School Dist., 65 Iowa, 209, 21 N. W. 567, a teacher discharged by school board appealed to state superintendent and eventually the state superintendent reversed the discharge, and declared him legally teacher. He then wrote to the school board offering to teach the remainder of the term and received no answer. He did not go in person and offer to teach. The court held that he was not entitled to recover compensation for the unexpired portion of the term after this time. This seems doubtful, since the action was brought to recover damages for the discharge.

[31] Such is the tendency of modern decisions. The question is, however, one rather of the right of action than of damages, and will not be further discussed here.

[32] *Maryland:* Olmstead *v.* Bach, 78 Md. 132, 22 L. R. A. 74, 27 Atl. 501, 44 Am. St. Rep. 273.

Ohio: James *v.* Allen Co., 44 Oh. St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Texas: Litchenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975.

the city of New York, that no action can be maintained for *wages* under the contract, and that the servant's only remedy is an action for damages for breach of the contract, in which he recovers full and final satisfaction.[33]

The servant cannot recover compensation for injured feelings in having been discharged prematurely.[34]

§ 666. Prospective damages recoverable.

In an action to recover damages for breach of the contract of employment, brought by the servant at once upon his discharge, the plaintiff must recover in one action his entire damage; and the measure of damages is, therefore, the amount of wages due at the time of trial, together with compensation for the future benefit the plaintiff would probably have realized under the contract, with the proper deductions.[35] Thus in a case where the plaintiff had been injured while in the defendant's employ, and the defendant contracted to continue to employ him while his disability continued, it was held that upon his discharge without cause the plaintiff might sue for the entire damage he had suffered by the discharge, not merely for the wages that were due at the time of trial.[36]

If, as often happens, the trial takes place before the end of the agreed term of employment, the damages accruing after the trial must of course be estimated; this, according to the view which is usually adopted, can be done with sufficient certainty, and the jury bases its verdict upon the probable duration of the employment and the probability of the plaintiff securing other employment after the time of the trial.[37]

[33] Moody *v.* Leverich, 4 Daly, 401; Polk *v.* Daly, 4 Daly, 411.

[34] Addis *v.* Gramophone Co. [1909], A. C. 488.

[35] *Indiana:* Ricks *v.* Yates, 5 Ind. 115; Richardson *v.* Eagle M. Works, 78 Ind. 422, 41 Am. Rep. 584, 95 N. E. 271; Ætna L. I. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Inland Steel Co. *v.* Harris (Ind. App.), 95 E. N. 271.

Maine: Sutherland *v.* Wyer, 67 Me. 64.

New York: Everson *v.* Powers, 89 N. Y. 527, 42 Am. Rep. 319.

Ohio: James *v.* Allen County, 44 Oh. St. 226, 58 Am. Rep. 821.

Tennessee: East Tennessee, V. & G. R. R. *v.* Staub, 7 Lea, 397.

Texas: Litchenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975.

England: Hartland *v.* General Exch. Bank, 14 L. T. Rep. 863.

[36] East Tenn., V. & G. R. R. *v.* Staub, 7 Lea, 397.

[37] *United States:* Pierce *v.* Tennessee,

So where the servant was employed for life, the probable length of the term of employment is determined by annuity tables and compensation is given for loss of the employment during such a term.[38]

C. I. & R. R., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. ed. 591; American C. D. Co. *v.* Boyd, 148 Fed. 258.

California: Seymour *v.* Oelrichs, 156 Cal. 782, 106 Pac. 88.

Colorado: Saxonia Mining & Reduction Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Indiana: Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; Inland Steel Co. *v.* Harris (Ind. App.), 95 N. E. 271.

Kentucky: Forked Deer Pants Co. *v.* Shipley, 80 S. W. 476, 25 Ky. Law Rep. 2299; Bridgeford *v.* Meagher, 139 S. W. 750.

Louisiana: De Camp *v.* Hewitt, 11 Rob. 290, 43 Am. Dec. 204.

Maine: Sutherland *v.* Wyer, 67 Me. 64.

Maryland: Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509; Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273.

Massachusetts: Cutter *v.* Gillette, 163 Mass. 95, 39 N. E. 1010; Daniell *v.* Boston & M. R. R., 184 Mass. 337, 68 N. E. 337, 339.

Michigan: Webb *v.* Depew, 152 Mich. 698, 116 N. W. 560, 16 L. R. A. (N. S.) 813.

Mississippi: Prichard *v.* Martin, 27 Miss. 305.

Missouri: Boland *v.* Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151; Miller *v.* Boot & Shoe Co., 26 Mo. App. 57; Lally *v.* Cantwell, 40 Mo. App. 50.

Nebraska: School District *v.* McDonald, 68 Neb. 610, 94 N. W. 829, 97 N. W. 584.

New Jersey: Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; Moore *v.* Central Foundry Co., 68 N. J. L. 14, 52 Atl. 292.

New York: Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. Supp. 787; Cottone *v.* Murray's, 138 App. Div. 874, 123 N. Y. Supp. 420.

Ohio: Kelly *v.* Wheel Co., 62 Oh. St. 598, 57 N. E. 984; Lake Erie & W. Ry. *v.* Tierney, 75 Oh. St. 565, 80 N. E. 1128, affirming 29 Ohio Cir. Ct. 83.

Pennsylvania: Wilke *v.* Harrison, 166 Pa. 202, 30 Atl. 1125.

Texas: G. A. Kelly Plow Co. *v.* London, (Tex. Civ. App.), 125 S. W. 974.

Vermont: Remelee *v.* Hall, 31 Vt. 582, 76 Am. Dec. 140.

Washington: Howay *v.* Going Northrup Co., 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 49 (*semble*).

West Virginia: Rhoades *v.* Chesapeake & O. Ry., 49 W. Va. 500, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826.

Wisconsin: Winkler *v.* Racine W. & C. Co., 99 Wis. 184, 74 N. W. 793.

England: Yelland's Case, L. R. 4 Eq. 350.

In Kennedy *v.* South Shore Lumber Co., 102 Wis. 284, 78 N. W. 567, a person employed to scale logs was wrongly discharged. It was held that the limit of damages was his wages for the amount of time it would probably have taken him to scale the logs.

If the trial does not take place until after the expiration of the term, although suit was brought during the term, the damages will of course be the same as if the plaintiff had not sued until the term expired. Howay *v.* Going-Northrup Co., 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 49.

[38] *United States:* Pierce *v.* East Tenn., C. I. & R. R., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. ed. 591.

Indiana: Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

In a few cases, however, it has been held that prospective damages for loss of service after the time of the trial are too uncertain for recovery. Thus in an early case in the Supreme Court of Wisconsin, where a clerk engaged at a salary of $2,000 a year for five years was discharged without cause at the end of the first year, and brought his action without waiting for the end of the term, it was held that he could recover damages measured by the contract down to the day of the trial only, with such deductions as were proper on the principles already stated.[39] This case has occasionally been followed;[40] but the decision seems to lose sight of the fact that the burden of proving the possibility of other employment (the seriously uncertain element in the case) is on the defendant, and the uncertainty should therefore not prejudice the plaintiff's recovery.

§ 667. General rule—Duty to seek employment.

In an action brought by a servant for breach of the contract of employment by his wrongful discharge, the measure of damages is the actual loss inflicted by the discharge.[41] It

Michigan: Brighton *v.* Lake Shore & M. S. Ry., 103 Mich. 420, 61 N. W. 550, 112 Mich. 217, 70 N. W. 432; Stearns *v.* Lake Shore & M. S. Ry., 112 Mich. 651, 71 N. W. 148.

New York: Schell *v.* Plumb, 55 N. Y. 592; Banta *v.* Banta, 84 App. Div. 138, 82 N. Y. Supp. 113.

West Virginia: Rhoades *v.* Chesapeake & O. Ry., 49 W. Va. 494, 39 S. E. 209, 89 Am. St. Rep. 826, 55 L. R. A. 170.

[39] Gordon *v.* Brewster, 7 Wis. 355 (overruled in Wisconsin by a subsequent decision: *supra*, note 37).

[40] *Minnesota:* McMullan *v.* Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409 (*semble*).

Two similar decisions in the Federal courts to the same effect: (Darst *v.* Mathieson Alkali Works, 81 Fed. 284; Schroeder *v.* California-Yukon T. Co. 95 Fed. 296) seem to be overruled by Pierce *v.* East Tenn., C. I. & R. R., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. ed. 591, *supra*. A few cases in the lower courts of New York [Maguire *v.* Woodside, 2 Hilt. (N. Y.) 59; Bassett *v.* French, 10 Misc. 672, 31 N. Y. Supp. 667; Zender *v.* Seliger-Toothill Co., 17 Misc. 126, 39 N. Y. Supp. 346] appear to be inconsistent with the cases in the Court of Appeals cited *supra*.

[41] *United States:* Emerson *v.* Howland, 1 Mason, 45.

Kentucky: Whitaker *v.* Sandifer, 1 Duv. 261; William Tarr Co. *v.* Kimbrough, 17 Ky. L. Rep. 1284, 34 S. W. 528.

Pennsylvania: Nixon *v.* Myers, 141 Pa. 477, 21 Atl. 670.

Texas: Meade *v.* Rutledge, 11 Tex. 44.

Virginia: Willoughby *v.* Thomas, 24 Gratt. 521.

England: Goodman *v.* Pocock, 15 Q. B. 576.

is the plaintiff's duty to use reasonable efforts to avoid loss by securing employment elsewhere.[42] The measure of damages is, therefore, *prima facie* the amount of wages he would have earned under the contract,[43] deducting, however, such

In Kelly *v.* Carthage Wheel Co., 62 Oh. St. 598, 57 N. E. 984, the plaintiff was to be paid by a percentage of the value of the work done under his supervision; with a guarantee, however, of a certain amount. If it had not been for the guarantee, plaintiff's damages would have been nominal, as there was no obligation on the defendant to manufacture any of the goods. In view of the guarantee the measure of damages is the proper proportion of the guarantee.

[42] *Alabama:* Wright *v.* Falkner, 37 Ala. 274.

Arkansas: Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

Missouri: Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283.

New Jersey: Goebel *v.* Pomeroy Bros. Co., 69 N. J. L. 610, 55 Atl. 690.

New York: Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Polk *v.* Daly, 4 Daly, 411.

Vermont: Sherman *v.* Champlain Tr. Co., 31 Vt. 162.

Contra, Stewart *v.* Walker, 14 Pa. 293 (*semble*), is not to be supported.

The servant, however, is not obliged to accept employment of a different nature.

United States: Leatherberry *v.* Odell, 7 Fed. 641.

Illinois: McKinley *v.* Goodman, 67 Ill. App. 374.

Michigan: Farrell *v.* School Dist., 98 Mich. 43, 56 N. W. 1053 (teacher employed in graded school need not teach in district school).

Missouri: Barney *v.* Spangler, 131 Mo. App. 58, 109 S. W. 855.

New York: Costigan *v.* Mohawk & H. R. R., 2 Denio, 609, 43 Am. Dec. 758; Fuchs *v.* Koerner, 107 N. Y. 529, 14 N. E. 445.

Pennsylvania: Harger *v.* Jenkins, 17 Pa. Super. Ct. 615 (inferior position).

Nor in a different region. Costigan *v.* Mohawk & H. R. R., 2 Denio (N. Y.), 609.

In Tarrell *v.* School Dist., 98 Mich. 43, 56 N. W. 1053, it was held that a school teacher could not be expected to go to work during her vacation, which was given her for rest, to find other employment.

In *Texas* the servant is allowed a reasonable time to find other employment of the same sort; but if after a reasonable time he cannot do so, he must accept different employment: Simon *v.* Allen, 76 Tex. 398, 13 S. W. 296; Kramer *v.* Wolf Cigar Stores Co., 91 S. W. 775.

In *Louisiana* a discharged servant is by statute entitled to recover the entire amount of his wages, without seeking other employment: Lartigue *v.* Peet, 5 Rob. 91, 43 Am. Dec. 204; DeCamp *v.* Hewitt, 11 Rob. 290, 43 Am. Dec. 204; Sherburne *v.* Orleans Cotton Press Co., 15 La. 360; DePuilly *v.* St. Louis Church, 7 La. Ann. 443; Lambert *v.* King, 12 La. Ann. 662; Trefethen *v.* Locke, 16 La. Ann. 19; Jones *v.* Jackson, 22 La. Ann. 112; Bormann *v.* Thiele, 23 La. Ann. 495; Leche *v.* Claverie, 25 La. Ann. 308; Taylor *v.* Kehlor, 26 La. Ann. 369; Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241.

[43] *United States:* Leatherberry *v.* Odell, 7 Fed. 641.

Alabama: Hartsell *v.* Masterson, 132 Ala. 275, 331 So. 616.

Arkansas: Gates *v.* School District, 57 Ark. 770, 21 S. W. 1060, 38 Am. St. Rep. 249.

sums as he earned or by reasonable diligence might have earned elsewhere,[44] and making allowance for the expenses of

Illinois: School Directors *v.* Kimmel, 31 Ill. App. 537.

Iowa: Worthington *v.* Oak & H. P. I. Co., 100 Iowa, 39, 69 N. W. 202.

Missouri: Nearns *v.* Harbert, 25 Mo. 352; Koenigkraemer *v.* Missouri Glass Co., 24 Mo. App. 124; Hansard *v.* Menderson Clothing Co., 73 Mo. App. 584; Rose *v.* Williamsville, G. & S. L. Ry., 146 Mo. App. 215, 123 S. W. 946; Simpson *v.* Ball, 145 Mo. App. 268, 129 S. W. 1017.

Nebraska: Omaha School Dist. *v.* McDonald, 68 Neb. 610, 94 N. W. 829.

New York: Costigan *v.* Mohawk & H. R. R., 2 Denio, 609; Milage *v.* Woodward, 186 N. Y. 252, 78 N. E. 873; Decker *v.* Hassell, 26 How. Pr. 528; Dearing *v.* Pearson, 8 Misc. 269, 28 N. Y. Supp. 715; Graff *v.* Blumberg, 53 Misc. 296, 103 N. Y. Supp. 184; Schleiff *v.* Berglas, 110 N. Y. Supp. 266.

Pennsylvania: King *v.* Steiren, 44 Pa. 99, 84 Am. Dec. 419.

South Carolina: Latimer *v.* New York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

Where the amount of wages was not fixed by the contract the basis of recovery is reasonable wages during the term. McDaniel *v.* Parks, 19 Ark. 671.

[44] *United States:* Foye *v.* Dabney, 1 Sprague, 212.

Colorado: Saxonia M. Co. *v.* Cook, 7 Colo. 569.

Connecticut: Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520.

Delaware: Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787.

Georgia: Ansley *v.* Jordan, 61 Ga. 482; Roberts *v.* Crowley, 81 Ga. 429.

Illinois: Brown *v.* Board of Education, 29 Ill. App. 572; School Directors *v.* Kimmel, 31 Ill. App. 537; School Directors *v.* Birch, 93 Ill. App. 499.

Indiana: Hinchcliffe *v.* Koontz, 121 Ind. 422, 16 Am. St. Rep. 403; Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154; Elkhart Rubber Works *v.* Neff (Ind. App.), 92 N. E. 553.

Iowa: Beymer *v.* McBride, 37 Ia. 114; Byrne *v.* Independent School Dist., 139 Ia. 618, 117 N. W. 983.

Kentucky: Whitaker *v.* Sandifer, 1 Duv. 261; Hayworth *v.* Haldeman, 14 Ky. L. Rep. 202; Mortonville Coal Co. *v.* Sisk, 139 L. W. 1086.

Maine: Sutherland *v.* Wyer, 67 Me. 64.

Maryland: Cumberland & P. R. R. *v.* Slack, 45 Md. 161; Baltimore Base Ball Club Co. *v.* Pickett, 78 Md. 375, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690.

Massachusetts: Dickinson *v.* Talmage, 138 Mass. 249; Maynard *v.* Royal W. C. Co., 200 Mass. 1, 85 N. E. 877.

Michigan: Harrington *v.* Gies, 45 Mich. 374; Champlain *v.* Detroit Stamping Co., 68 Mich. 238.

Mississippi: Prichard *v.* Martin, 27 Miss. 305.

Missouri: Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316; Squire *v.* Wright, 1 Mo. App. 172.

New York: Everson *v.* Powers, 89 N. Y. 527, 42 Am. Rep. 319; Gillis *v.* Space, 63 Barb. 177; DeLeon *v.* Echeverria, 45 N. Y. Super. Ct. 610; Heim *v.* Wolf, 1 E. D. Smith, 70; Thompson *v.* Wood, 1 Hilt. 93; Huntington *v.* Ogdensburgh & L. C. R. R., 33 How. Pr. 416; Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. Supp. 787; King *v.* Will J. Block Amusement Co., 115 N. Y. Supp. 243; Goldberg *v.* Weinberger, 115 N. Y. Supp. 1098.

North Carolina: Hendrickson *v.* Anderson, 50 N. C. (5 Jones L.) 246, 72 Am. Dec. 549; Currier *v.* W. M. Ritter Lumber Co., 150 N. C. 694, 64 S. E. 763.

Ohio: St. Bernard *v.* Reig, 13 Ohio Cir. Ct. 540, 7 Ohio Cir. Dec. 539.

Pennsylvania: King *v.* Steiren, 44

obtaining employment.[45] The burden of proof is on the defendant to show that the plaintiff might have obtained other employment,[46] for the failure of the plaintiff to obtain other

Pa. 99, 84 Am. Dec. 419; Kirk *v.* Hartman, 63 Pa. 97.

South Carolina: Latimer *v.* New York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

Tennessee: Congregation of Children of Israel *v.* Peres, 2 Cold. 620.

Texas: Fowler *v.* Waller, 25 Tex. 695; Bluefields Banana Co. *v.* Wolfe (Civ. App.), 22 S. W. 269; Gulf, C. & S. F. Ry. *v.* Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89; G. A. Kelly Plow Co. *v.* London (Tex. Civ. App.), 125 S. W. 974.

Virginia: Willoughby *v.* Thomas, 24 Gratt. 521.

Wisconsin: Barker *v.* Knickerbocker Ins. Co., 24 Wis. 630, 1 Am. Rep. 187; Winkler *v.* Racine Wagon & C. Co., 99 Wis. 184, 74 N. W. 793.

England: Yelland's Case, L. R. 4 Eq. 350.

In Allen *v.* Maronne (Tenn.), 23 S. W. 113, the plaintiff employed for a year was wrongfully discharged after a month by reason of defendant's insolvency. He then got employment with another for an indefinite term and was discharged for his alleged misconduct after a month; this employer went out of business in three months. Plaintiff meanwhile got other employment during the remainder of the three months at higher wages but the third employment then ceased. It was held that whether or not he could be charged with the wages which he would have earned on the second employment but for his misconduct, since the employment would have lasted only till the second employer went out of business, and as in fact he earned more in this case than he would have done if he had retained his second employment, the cause of his discharge from that employment was immaterial.

In Gates *v.* School Dist., 57 Ark. 370, 21 S. W. 1060, 38 Am. St. Rep. 249, it was held that damages are not reduced by the fact that, having moved out to a farm, plaintiff's expenses of living were less than in the city where he was employed. That is not part of the expense of performing the contract.

[45] *United States:* Development Co. of America *v.* King, 170 Fed. 923, 96 C. C. A. 139.

Massachusetts: Dickinson *v.* Talmage, 138 Mass. 249.

In Tufts *v.* Plymouth Gold Min. Co., 14 Allen (Mass.), 407, a workman was improperly discharged, at a distance from his home. It was held that he could not recover the cost of getting home; but in determining how much he might have realized elsewhere the cost of getting where he could receive employment might be considered. But in Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292, one discharged before the end of his term of service was held not entitled to deduct from the amount of wages that he earned elsewhere the expenses of moving himself and his family back where he came from in order to get the new employment.

[46] *United States:* Leatherberry *v.* Odell, 7 Fed. 641; Schroeder *v.* California Y. T. Co., 95 Fed. 296; Mathesius *v.* Brooklyn Heights R. R., 96 Fed. 792.

Arkansas: Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

California: Rosenberger *v.* Pacific Coast Ry., 111 Cal. 313, 43 Pac. 963.

Illinois: Fish *v.* Glass, 54 Ill. App. 655.

Massachusetts: Maynard *v.* Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877.

employment does not affect the right of action, but only goes in reduction of damages, and if nothing else is shown, the plaintiff is entitled to recover the contract price upon proving the defendant's violation of the contract, and his own willingness to perform.[47] The fact that the plaintiff obtained new em-

Michigan: Allen *v.* Whitlark, 99 Mich. 492, 58 N. W. 470.

Minnesota: Bennett *v.* Morton, 46 Minn. 113, 48 N. W. 678.

Mississippi: Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Missouri: Nearns *v.* Harbert, 25 Mo. 352; Koenigkraemer *v.* Missouri Glass Co., 24 Mo. App. 124; Simpson *v.* Ball, 145 Mo. App. 268, 129 S. W. 1017.

Nebraska: Wirth *v.* Calhoun, 64 Neb. 316, 89 N. W. 785.

New York: Costigan *v.* Mohawk & H. P. R. R., 2 Denio, 609, 43 Am. Dec. 758; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Milage *v.* Woodward, 186 N. Y. 252, 78 N. E. 873; Dearing *v.* Pearson, 8 Misc. 269, 28 N. Y. Supp. 715; Graff *v.* Blumberg, 53 Misc. 296, 103 N. Y. Supp. 184; Schleiff *v.* Berglas, 110 N. Y. Supp. 266.

Pennsylvania: Kirk *v.* Hartman, 36 Pa. 97; Heyer *v.* Cunningham Piano Co., 6 Pa. Super. Ct. 504.

South Carolina: Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

Texas: Allgeyer *v.* Rutherford (Civ. App.), 45 S. W. 628; Weber Gas & G. E. Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46; Pacific Exp. Co. *v.* Walters (Tex. Civ. App.), 93 S. W. 496; Peacock *v.* Coltrane, 44 Tex. Civ. App. 530, 99 S. W. 107.

Wisconsin: Babcock *v.* Appleton Manuf. Co., 93 Wis. 124, 67 N. W. 33.

Plaintiff need not allege in the declaration that he could not have obtained other employment. Wirth *v.* Calhoun, 64 Neb. 316, 89 N. W. 785.

In John C. Lewis Co. *v.* Scott, 14 Ky. L. Rep. 713, it was held that a servant wrongfully discharged must allege in his declaration that he could get no other employment, or else he is entitled to only nominal damages; but this case is clearly wrong.

Where it is shown that other employment was or could have been had, it would seem that the burden remains on the defendant to show what wages could have been obtained.

United States: Schroeder *v.* California Yukon Trading Co., 95 Fed. 296.

California: Rosenberger *v.* Pacific Coast Ry., 111 Cal. 313, 43 Pac. 963.

Contra, Ruland *v.* Waukesha Water Co., 52 App. Div. 280, 65 N. Y. Supp. 87.

In Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381, it was held that the burden of showing that the wages obtained in other employment were lower than they should have been was on the employer.

[47] *Alabama:* Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Colorado: Saxonia M. Co. *v.* Cook, 7 Colo. 569.

Georgia: Ansley *v.* Jordan, 61 Ga. 482; Roberts *v.* Crowley, 81 Ga. 429.

Illinois: Brown *v.* Board of Education, 29 Ill. App. 572.

Indiana: Gazette P. Co. *v.* Morss, 60 Ind. 153, Hinchcliffe *v.* Koontz, 121 Ind. 422; 23 N. E. 271, 16 Am. St. Rep. 403.

Minnesota: Horn *v.* Western Land Assoc., 22 Minn. 233.

Missouri: Pond *v.* Wyman, 15 Mo. 175.

Pennsylvania: King *v.* Steiren, 44 Pa. 99, 84 Am. Dec. 419.

Wisconsin: Barker *v.* Knickerbocker Ins. Co. 24 Wis. 630.

ployment does not constitute a defense. It is one of the facts for the jury to consider in estimating the plaintiff's loss; [48] and to entitle the defendant to reduce the recovery on the ground that the plaintiff had earned money in another employment, it must be shown that if he had not been discharged, he could not have earned it without violating his duty under his contract.[49] Of course, if the plaintiff, at request of the defendant, held himself in readiness to go to work again after his discharge, he may recover the full amount of wages.[50]

Where the plaintiff immediately after his wrongful discharge obtained another employment at a higher salary, it was held that he could recover only nominal damages.[51] And an offer by the defendant to take the plaintiff back into his employ may be shown in reduction of damages, if there was nothing that should have prevented the plaintiff from accepting the offer.[52]

[48] *Alabama:* Morris Mining Co. *v.* Knox, 96 Ala. 320, 11 So. 207; Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712.

Illinois: Williams *v.* Chicago Coal Co., 60 Ill. 149.

[49] *Arkansas:* Van Winkel *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

California: Nuckolls *v.* College of Physicians and Surgeons, 7 Cal. App. 233, 94 Pac. 81.

Maryland: Jaffray *v.* King, 34 Md. 217.

Therefore if the servant has before discharge performed all the work he was to do, he can recover the whole contract without deduction. In Adams *v.* Cox, 1 Nott & McC. (S. C.) 284, an overseer was turned off before the end of the year but after a crop had been made. *Held*, that he was entitled to recover his salary for the whole year. In Seed *v.* Johnston, 63 App. Div. 340, 71 N. Y. Supp. 579, plaintiff was to give defendant his advice during his life, so far as it should be required, and he was to receive 50 dollars a month. It was held that if plaintiff was discharged from the employment, since there was nothing for him to do under the contract if he was not called upon, he could sue from month to month and recover each month the instalment due for that month.

[50] Bromley *v.* School Dist. No. 5, 47 Vt. 381.

[51] Williams *v.* Anderson, 9 Minn. 50.

[52] *Illinois:* Trawick *v.* Peoria & F. C. St. Ry., 68 Ill. App. 156.

Mississippi: Birdsong *v.* Ellis, 62 Miss. 418.

Missouri: Squire *v.* Wright, 1 Mo. App. 172.

New York: Bigelow *v.* American F. P. Mfg. Co., 39 Hun, 599.

South Carolina: Mitchell *v.* Toale, 25 S. C. 238, 60 Am. Rep. 502.

England: Brace *v.* Calder, [1895] 2 Q. B. 253.

New Zealand: Wilson *v.* Kisri, 18 N. Z. (Sup. Ct.) 807.

Where the acceptance of employment offered by the employer at a lower rate would be taken as a modification of the original agreement, the servant is of course not called upon to accept it.

Alabama: People's Co-operative Assoc. *v.* Lloyd, 77 Ala. 387.

Thus in Beymer *v.* McBride,[53] the defendant had agreed to make the plaintiff agent for the sale of certain machines for which he was agent, and to turn over to him all the orders already given and the machines required to fulfil the orders. On his failure to keep the agreement, it was held proper to show that two days after the breach the owners of the machines offered to turn the orders and machines over to the plaintiff, and that the plaintiff had refused to accept; for the plaintiff was bound to use ordinary efforts to make the damages as light as possible.

Where the plaintiff, after seeking other employment without success, does work for himself, it has been held in Michigan that the value of such work need not be deducted;[54] but in New York where he went to work on his own account, the value of his work was deducted from the amount he recovered.[55] In all such cases the question would seem to be: was his work on his own account incompatible with the performance of the original service?[56] If he engaged in business on his own account, the profits of the business should be deducted from the agreed wages;[57] and if the business had acquired a value, although no profits were realized, it has been held that such value should be deducted.[58]

§ 668. Employment terminable on notice—Domestic service. A servant is often employed on a contract terminable by notice within a certain time, or at once by paying wages for

Iowa: Jackson *v.* Steamboat Rock Independent School District, 110 Iowa, 313, 77 N. W. 860.

Michigan: Chisholm *v.* Preferred Bankers' L. Assur. Co., 112 Mich. 50, 70 N. W. 415.

Missouri: Howard *v.* Vaughan-Monnig Shoe Co., 82 Mo. App. 405.

New York: Whitmarsh *v.* Littlefield, 46 Hun, 418.

For the same reason the servant need not accept the tender of employment of a different sort.

Iowa: Jackson *v.* Steamboat Rock Independent School Dist., 110 Ia. 313, 77 N. W. 860.

New York: Hecht *v.* Brandus, 4 Misc. 58, 23 N. Y. Supp. 1004.

[53] 37 Ia. 114.

[54] Harrington *v.* Gies, 45 Mich. 374.

[55] Huntington *v.* Ogdensburgh & L. C. R. R., 33 How Pr. 416; *acc.*, Gates *v.* School Dist., 57 Ark. 370, 21 S. W. 1060, 38 Am. St. Rep. 249.

[56] Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

[57] Richardson *v.* Hartman, 68 Hun (N. Y.) 9, 22 N. Y. Supp. 645.

[58] Kramer *v.* Wolf Cigar Stores Co., 99 Tex. 597, 91 S. W. 775, 777.

that time. Such are the contracts of domestic servants, terminable by a month's warning or a month's wages. In such a case the month's wages is in the nature of stipulated damages; [59] it may be recovered upon discharge without warning.[60] If the servant employed on such a contract leaves without notice, the employer is entitled to the actual damages he suffers from the breach of contract.[61]

When the contract is terminable at any time on notice, and the servant is discharged without formal notice, the discharge is to be regarded as notice, and he may recover wages up to the time of discharge,[62] but only nominal damages for the discharge.[63] Where the servant left without giving notice it was held in an early case that he thereby forfeited wages earned before that time.[64]

[59] Fewings *v.* Tisdal, 1 Ex. 295.

[60] *Delaware:* Shea *v.* Kerr, 1 Pennewill, 530, 40 Atl. 241.

Michigan: Derry *v.* East Saginaw Bd. of Education, 102 Mich. 631, 61 N. W. 61.

England: East Anglian Ry. *v.* Lythgoe, 10 C. B. 726; Robinson *v.* Hindman, 3 Esp. 235; Gordon *v.* Potter, 1 F. & F. 644.

In Maw *v.* Jones, 25 Q. B. D. 107, the plaintiff was an apprentice under a contract which gave defendant a right to discharge on a week's notice. Plaintiff was wrongfully discharged without notice. It was held that the jury could consider that he might be discharged on a week's notice in arriving at the amount of damages but was not necessarily confined to a week's wages.

In Stowell *v.* Greenwich Ins. Co., 20 App. Div. 188, 46 N. Y. Supp. 802, where the time of notice was 90 days the court appears to have thought that the jury should consider the chance of other employment. But in Briscoe *v.* Litt, 19 N. Y. Misc. 5, 42 N. Y. Supp. 908, where the time was 2 weeks, the court ruled that the plaintiff was not bound to seek other employment.

[61] *Connecticut:* Satchwell *v.* Williams, 40 Conn. 371.

Massachusetts: Hunt *v.* Otis Co., 4 Met. 464.

In Hughes *v.* Wamsutta Mills, 11 Allen (Mass.), 201, the plaintiff was arrested and imprisoned for crime. It was held that this being outside his own volition, he was excused from giving two weeks' notice and might recover. The fact that his crime was the cause of it is immaterial because it was a remote cause.

[62] *New York:* Gates *v.* Davenport, 29 Barb. 160.

North Carolina: Steed *v.* McRae, 1 Dev. & Bat. 435.

[63] *Minnesota:* Bolles *v.* Sachs, 37 Minn. 315.

New York: Davis *v.* Barr, 12 N. Y. St. 111 (one day's wages); Frank *v.* Manhattan M. & Dispensary, 107 N. Y. Supp. 404.

Wisconsin: Cronemillar *v.* Duluth-Superior Milling Co., 134 Wis. 248, 114 N. W. 432.

[64] Monell *v.* Burns, 4 Denio (N. Y.), 121; *Quære* whether this case would be followed to-day. The contrary was held in Evans *v.* Bennett, 7 Wis. 404.

§ 669. Compensation by share or percentage of an uncertain amount.

When a person is employed on an agreement by which he is to be compensated by the whole or a part of an amount to be fixed in the future, and he is discharged before the amount can be fixed, recovery according to the contract may be difficult, or impossible.[65] Thus where a superintendent was to be paid a commission on goods manufactured under his supervision, and he was discharged before the end of his term of service, only nominal damages could be recovered, since there was no way of fixing the amount of goods that would have been manufactured.[66] But if the enterprise continued after the plaintiff's discharge, so that the amount can be fixed, he is entitled to compensation based on the percentage of the actual amount thus fixed. So where a fisherman is to be paid according to the catch of fish, and he is discharged wrongfully before the termination of the voyage, he is entitled to compensation based on the actual catch.[67] And where the plaintiff was hired for a year as overseer of the defendant, and was to receive a proportion of the crop, he was allowed, upon being wrongfully discharged just before harvest, to recover the agreed proportion of the matured crop.[68] In a case where the plaintiff was employed to measure lumber for a logger at a certain price per thousand feet, and was wrongfully discharged, he was held entitled to his commission on the amount of lumber cut during the year.[69] And where the compensation of the overseer of a manufacturer was to be a percentage on the actual sales, and during the employment certain goods were manufactured which were sold after the employment ceased, it was held that plaintiff was entitled to his percentage on them.[70] On this principle, where the plaintiff served defendant as minister,

[65] For a consideration of this subject in the case of agency, see *infra*, § 834c.

[66] Kelly *v.* Carthage Wheel Co., 62 Oh. St. 598, 57 N. E. 984 (*semble*).

[67] *United States:* Fee *v.* Orient Fertilizing Co., 36 Fed. 509.

Massachusetts: Dennis *v.* Maxfield, 10 Allen, 138.

[68] Clancey *v.* Robertson, 2 Mills (S. C.), 404, 12 Am. Dec. 682. But when the discharge was at an earlier stage of the crop, an allowance of the agreed proportion of a *probable average crop* is questionable. Such an allowance was made in Hassell *v.* Nutt, 14 Tex. 260.

[69] Pinet *v.* Montague, 103 Mich. 516, 61 N. W. 876.

[70] Byrnes *v.* Baldwin, 17 N. Y. Misc. 280, 40 N. Y. Supp. 386.

agreeing to receive in compensation the amount of subscriptions, which the defendant agreed to collect, and the defendant did not collect the subscriptions, it was held that plaintiff might recover the amount of the uncollected subscriptions which could have been collected by reasonable diligence, but was not entitled to recover on a *quantum meruit*.[71]

§ 670. Compensation payable on a contingency.

The compensation of a servant or agent often depends upon a contingency. In such a case, where a breach of the contract by the employer prevents the happening of the contingency he will not be allowed by taking advantage of his own breach of contract to prevent the plaintiff from recovering compensation altogether.[72] If in such a case the amount of compensation can be determined, the plaintiff will be allowed to recover it, though, through the defendant's default, the contingency upon which it was payable has not happened. Thus, where the plaintiff was to receive £20 at Lady Day, if he stayed till then, and the defendant wrongfully discharged him before Lady Day, he was allowed to recover the £20.[73]

Where the amount of compensation, which would be due under the contract, cannot be determined, the plaintiff may recover the value of his services. Thus, where the plaintiff was engaged by the defendant to train, enter in races and ride the

[71] Myers *v.* Baptist Society, 38 Vt. 614.

[72] In Schreiber *v.* Klingerstein, 95 N. Y. Supp. 549, plaintiff was to receive for his services $10 a week while traveling and $20 while at home and was to travel whenever directed to do so by the defendant. Being wrongly discharged, the court held that his compensation was to be reckoned at $20 a week. While at home he would have to board himself, and therefore it was proper to give him that except when he was sent on the road; and the defendant could reduce the amount to $10, only by giving him orders to travel.

In Rightmire *v.* Hirner, 188 Pa. 325, 41 Atl. 538, plaintiff was to sell machines for defendant. Defendant discharged plaintiff before the end of term. Under the contract the defendant was not bound to continue the manufacture of the machines. *Held*, that the measure of damages was the value of the contract at the time of the breach, and in considering the value the jury were to bear in mind that the defendants were not obliged to continue the manufacture of the machines, that the plaintiff's rights were subject to the contingencies of business, which might tend to reduce the sales; and they were also to take into consideration what the plaintiff could probably have earned in some other employment during the period of the contract.

[3] Lake *v.* Campbell, 5 L. T. Rep. 582.

defendant's horse in races for a year, his compensation to be two-thirds of the net profits, and the defendant broke the contract, the defendant claimed that the measure of damages was two-thirds of the value of the use of the horse for a year. The court, however, allowed the plaintiff to recover the value of his services, on the ground that the defendant had put it entirely out of the plaintiff's power to secure remuneration at the contract rate.[74]

§ 671. Services rendered in expectation of compensation.

Where services are rendered upon request of the defendant, or are voluntarily accepted by him,[75] or are rendered in the mutual expectation of compensation but without any express agreement as to the terms of service, the plaintiff is entitled to recover as compensation what the services were worth.[76] Thus where the plaintiff took the defendant's horse to train with the understanding that a formal agreement should be made later,

[74] Barr *v.* Van Duyn, 45 Ia. 228. In Ellsler *v.* Brooks, 54 N. Y. Super. Ct. 73, the plaintiff was employed as an actress, to receive 50% of the net profits. After a season lasting several weeks carried on at a loss the defendant refused to fulfil his contract any longer. It was held that since the measure of damages was the amount of profits to which she would have been entitled, and as on the evidence it was impossible to show any profits that would have been earned, she was entitled to nominal damages only. This must be distinguished on the ground that the defendant was able to prove with reasonable certainty that there would have been no profits.

[75] *Alabama:* McFarland *v.* Dawson, 125 Ala. 428, 29 So. 327.

Illinois: Moline W. P. & M. Co. *v.* Nichols, 26 Ill. 90.

[76] *Illinois:* Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583.

Maryland: Gambrill *v.* Schooley, 89 Md. 546, 43 Atl. 918.

Missouri: Crole *v.* Thomas, 19 Mo. 70; Sprague *v.* Lea, 152 Mo. 327, 53 S. W. 1074; Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285.

New Jersey: Cooke *v.* Independent T. & T. C. Co., 77 N. J. L. 454, 68 Atl. 790.

So where plaintiff acted as secretary of a corporation, not being a director or officer of the corporation, he was entitled to compensation like any other employee on a *quantum meruit.* Smith *v.* Long Island R. R., 102 N. Y. 190, 6 N. E. 397.

In Boardman *v.* Ward, 40 Minn. 399, 42 N. W. 202, 12 Am. St. Rep. 749, the plaintiff lived in her guardian's family, performing services, under the assumption that she was getting her board and clothing as compensation for such services, and that nothing would be charged for them. The guardian knew that that was her understanding, but nevertheless in his guardian's account charged for her board and clothes. It was held that she was entitled to recover compensation for services rendered by her in spite of the fact that she did not expect to be paid for them when she rendered them.

and after the plaintiff had rendered services the defendant took the horse away, it was held that the plaintiff might recover the value of his services.[77] And on the same principle, where services are rendered and there is a misunderstanding as to the amount of compensation, the plaintiff may recover the value of the services;[78] and so where they are rendered under an express agreement, but the agreement is silent as to the price.[79] So where a person performs services with the understanding between him and his employer that compensation for the services is to be made by will, the person so serving is entitled if he does not receive full compensation by will to recover the value of the services;[80] but if the servant rendered the services merely in the hope of obtaining a legacy but without any understanding to that effect with the employer, he is entitled to no compensation.[81]

§ 672. Interruption of service by unavoidable cause.

Where the performance of the service is interrupted before its conclusion by some cause which absolves the parties from continuing the performance of the contract, the servant should

[77] Wright *v.* Broome, 67 Mo. App. 32.

[78] *California:* Hartman *v.* Rogers, 69 Cal. 643, 11 Pac. 581.

Kansas: Turner *v.* Webster, 24 Kan. 38.

New York: Constable *v.* Lefever, 66 Hun, 628, 21 N. Y. Supp. 38.

Vermont: Tucker *v.* Preston, 60 Vt. 473.

[79] *Arkansas:* McDaniel *v.* Parks, 19 Ark. 671.

Illinois: Lockwood *v.* Onion, 56 Ill. 506.

Massachusetts: Stowe *v.* Buttrick, 125 Mass. 449.

New York: Erben *v.* Lorillard, 2 Keyes, 567.

[80] *United States:* Little *v.* Dawson, 4 Dall. 111, 1 L. ed. 763.

New Jersey: Updike *v.* Ten Broeck, 32 N. J. L. 105 (adult son).

New York: Jacobson *v.* Le Grange, 3 Johns. 199 (nephew); Robinson *v.* Raynor, 28 N. Y. 494; Reynolds *v.* Robinson, 64 N. Y. 589; Collier *v.* Rutledge, 136 N. Y. 621, 32 N. E. 626; Stokes *v.* Pease, 79 Hun, 304, 29 N. Y. Supp. 430; Miller *v.* Richardson, 88 Hun, 49, 34 N. Y. Supp. 506; Hopkins *v.* Clark, 90 Hun, 4, 34 N. Y. Supp. 506.

Pennsylvania: Kauss *v.* Rohner, 172 Pa. 481, 33 Atl. 1016, 51 Am. St. Rep. 762 (adopted child).

In Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349, a son agreed to take care of his father during life, and the father agreed to leave plaintiff his property. The father became insane and could not do so. Plaintiff was entitled to recover on a *quantum meruit* the value of his services, less what he received from the property during his father's lifetime over and above the cost of taking care of his father.

[81] *United States:* Little *v.* Dawson, 4 Dall. 111, 1 L. ed. 763.

New Jersey: Grandin *v.* Reading, 10 N. J. Eq. (2 Stockt.) 370.

England: Osborn *v.* Guy's Hospital, 2 Str. 728.

be allowed to recover compensation for the service which he performed. Thus, where the performance of service is interrupted by illness on the part of the workman he is entitled to recover compensation for that portion of the whole work which he has done.[82] So where a person engaged to serve dies before completing the service his representatives are entitled to recover compensation for his services up to the time of his death;[83] and where the employer dies and the service is personal the servant can recover wages to the date of the death only.[84] So where an epidemic disease prevents the complete performance of the service the servant is entitled to recover for what he has done before the outbreak of the disease.[85]

[82] *Connecticut:* Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Missouri: Hughes *v.* Toledo S. & C. R. R., 112 Mo. App. 91, 86 S. W. 895.

New York: Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388; Clark *v.* Gilbert, 26 N. Y. 279, 84 Am. Dec. 189.

South Dakota: McClellan *v.* Harris, 7 S. D. 447, 64 N. W. 522.

Vermont: Hubbard *v.* Belden, 27 Vt. 645.

Washington: MacFarlane *v.* Allan-Pfeiffer Chemical Co., 59 Wash. 154, 109 Pac. 604.

Wisconsin: Green *v.* Gilbert, 21 Wis. 395.

See also *ante*, § 655c.

In a few cases it has been intimated that there should be a deduction of the amount of loss caused to the employer.

Alabama: Hunter *v.* Waldron, 7 Ala. 753; Jones *v.* Deyer, 16 Ala. 221, 50 Am. Dec. 177.

Connecticut: Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Vermont: Patrick *v.* Putnam, 27 Vt. 759.

Washington: Mendenhall *v.* Davis, 52 Wash. 169, 100 Pac. 336; MacFarlane *v.* Allan-Pfeiffer C. Co., 59 Wash. 154, 109 Pac. 604.

Wisconsin: Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865.

Of course entire performance of the contract may expressly be made a condition of any recovery of wages whatever; in such a case, failure completely to perform, even though caused by illness, is a complete bar to recovery.

Alabama: Givhan *v.* Dailey, 4 Ala. 336 (as explained in Hunter *v.* Waldron, 7 Ala. 753).

Massachusetts: Noon *v.* Salisbury Mills, 3 Allen, 340.

In Greene *v.* Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707, recovery was refused on the form of the pleadings.

In Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57, it was held that if the illness was one which the husband should have foreseen (pregnancy), he cannot recover for services of his wife which were interrupted before full performance by the illness.

[83] *Alabama:* Hunter *v.* Waldron, 7 Ala. 753.

Rhode Island: Parker *v.* Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858.

South Carolina: Clendinen *v.* Black, 2 Bailey, 488, 23 Am. Dec. 149.

Washington: Mendenhall *v.* Davis, 52 Wash. 169, 100 Pac. 336.

[84] Lacy *v.* Getman, 119 N. Y. 109, 23 N. E. 452, 16 Am. St. Rep. 806, 6 L. R. A. 728.

[85] Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77.

In some cases it is said that the plaintiff is entitled to complete compensation in spite of absence for illness. So where a person was engaged to teach school for a term and the school was closed for a portion of the term on account of an epidemic disease, the teacher was held to be entitled to her entire salary.[86] Such also was held to be the rule of the admiralty law in case of an injury to a seaman in the course of the voyage; [87] and in a Colorado case it was held that a stenographer employed by the week, who was absent for some time by reason of illness, in accordance with the business custom should receive entire wages in spite of time lost.[88] In Gray *v.* Murray [89] the plaintiff's intestate went out as supercargo for defendant under an agreement for a commission and percentage of profits. After the voyage was partly completed he was prevented by illness from going further, and substituted another in his place, to be paid by himself. This substitution was approved by the defendant. It was held that, whatever might be the rule of law, in equity at least the administrator was entitled to recover the entire amount of commissions and percentages of profits, paying the substitute as agreed. And this would seem to be the true rule of damages at law.

The rule appears to be the same if performance of the service is interrupted by the law,[90] or by other unavoidable cause for which the plaintiff is not responsible.[91]

§ 673. Services rendered on a contract rescinded by mutual consent.

Where a contract of service is cancelled by mutual consent of the parties the servant is entitled to recover the value of the

[86] McKay *v.* Barnett, 21 Utah, 239, 247, 60 Pac. 1100, 50 L. R. A. 371.

[87] Chandler *v.* Grieves, 2 H. Bl. 606.

[88] Mott *v.* Baxter, 13 Colo. App. 63, 56 Pac. 192.

[89] 3 Johns. Ch. (N. Y.) 167.

[90] *Ante*, § 655c. In Jewell *v.* Thompson, 2 Litt. (Ky.) 52, however, where the plaintiff agreed to act as defendant's substitute in the army for six months for an agreed compensation and he was discharged from the army at the end of a few weeks on account of peace, it was held that he could recover nothing.

[91] In Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865, the plaintiff left the employment before the end of the term because of the threats of strikers. It was held that if he was justified in leaving for such a cause he was entitled to the same compensation as if his service had been interrupted by illness.

services rendered by him up to the time of rescission at the contract rate.[92] This doctrine must be the explanation of a series of cases in South Carolina which would otherwise seem opposed to sound principle.[93]

§ 673a. Services rendered by an infant.

If an infant agrees to serve upon certain terms he is not bound by the contract but may at the proper time repudiate it; and in that case since he has the right to repudiate the contract he can be held bound by no term of it whatever. He is therefore not bound by the rate of compensation named in the contract, and is entitled to recover the value of the services without regard to the contract rate.[94] Similarly, if a minor

[92] *Texas:* Ratcliff *v.* Baird, 14 Tex. 43.

Vermont: Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564; Boyle *v.* Parker, 46 Vt. 343.

See *ante*, § 655*e*.

[93] Byrd *v.* Bord, 4 McCord, 246, 17 Am. Dec. 740; Eaken *v.* Harrison, 4 McCord, 249, 17 Am. Dec. 740; McClure *v.* Pyatt, 4 McCord, 26; Suber *v.* Vanlew, 2 Speer, 126; Saunders *v.* Anderson, 2 Hill (S. C.), 486.

[94] *Illinois:* Ray *v.* Haines, 52 Ill. 485.

Indiana: Dallas *v.* Hollingsworth, 3 Ind. 537; Wheatly *v.* Miscal, 5 Ind. 142; Van Pelt *v.* Corwine, 6 Ind. 363; Garner *v.* Noard, 27 Ind. 323.

Maine: Judkins *v.* Walker, 17 Me. 38, 35 Am. Dec. 229; Derocher *v.* Continental Mills, 58 Me. 217, 4 Am. Rep. 286.

Massachusetts: Moses *v.* Stevens, 2 Pick. 332; Nickerson *v.* Easton, 12 Pick. 110; Vent *v.* Osgood, 19 Pick. 572; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580.

New Hampshire: Lufkin *v.* Mayall, 25 N. H. 82 (overruling Weeks *v.* Leighton, 5 N. H. 343); Hagerty *v.* Nashua Lock Co., 62 N. H. 576.

New York: Medbury *v.* Watrous, 7 Hill, 110 (overruling McCoy *v.* Huffman, 8 Cow. 84); Whitemarsh *v.* Hall, 3 Denio, 375.

Wisconsin: Mountain *v.* Fisher, 22 Wis. 93.

An infant who contracted to perform services in payment for a house left the service on coming of age. It was held that he was entitled on a *quantum meruit* to get the value of the services performed, without reference to the value of the house. Medbury *v.* Watrous, 7 Hill (N. Y.), 110. In Dunton *v.* Brown, 31 Mich. 182, however, an infant made a contract of partnership and rendered services. He afterwards repudiated the contract before he came of age. It was held that infants could not repudiate contracts before age, and so could not substitute a *quantum meruit*. The court was uncertain whether he could do it after age if the contract had meanwhile been executed.

Allowance must of course be made for any money or property received by the infant under the contract and retained by him.

Missouri: Sherlock *v.* Kimmell, 75 Mo. 77 (infant had part of his time allowed him to earn money for himself).

Vermont: Taft *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228.

In Burroughs *v.* Morse, 48 Mich. 520, 12 N. W. 684, a minor was em-

enter the service of the defendant without permission of his father, the father may recover the reasonable value of his services, less the amount of compensation which the minor has received.[95] In so far, however, as the contract has been completely performed on both sides it is usually held that the servant cannot repudiate it, but is bound by its terms as to compensation, provided it was a beneficial contract.[96] If the minor continues to serve after he comes of age he thereby ratifies the agreement and he is then bound by it in all its parts.[97]

In a few cases it has been intimated that the infant who repudiates his contract must allow in reduction such damages as his premature leaving the service caused to his master.[98] This doctrine appears to be unsound since the infant repudiating his agreement should be protected from every portion of it; and it is usually held that no allowance can be made for the employer's loss.[99] In certain cases the infant may be legally

ployed to work, and was to receive board and clothes and schooling in winter. He was kept at work during winter and not sent to school. *Held*, since this work was outside the contract he was entitled to recover compensation for it. In Roundy *v.* Thatcher, 49 N. H. 526, the father of a minor made an agreement that the minor should serve for a certain time for his board and clothes. Having served part of the time and received board and clothes, the minor left. *Held*, that plaintiff could recover nothing since the contract had been broken. Even under the doctrine of Britton *v.* Turner, the plaintiff would be entitled to recover no further compensation, since the compensation provided for in the contract had been paid exactly as called for. But note, that this is a case of breach of valid contract made by the father, not a case of repudiation of his own contract by an infant.

[95] *Missouri:* Sherlock *v.* Kimmell, 75 Mo. 77.

New Hampshire: Huntoon *v.* Hazelton, 20 N. H. 388.

[96] *Massachusetts:* Stone *v.* Dennison, 13 Pick. 1, 23 Am. Dec. 654.

Wisconsin: Mountain *v.* Fisher, 22 Wis. 93.

[97] *Ohio:* Fordyce *v.* Easthope, 10 Ohio Dec. 610.

Vermont: Forsyth *v.* Hastings, 27 Vt. 646.

In Henderhen *v.* Cook, 66 Barb. (N. Y.) 21, a minor agreed to serve for a certain time at a certain rate. His father sued on the contract, the minor having left the employment before the expiration of the term. *Held*, by suing on the contract the father adopted it, and could not make any claim except in accordance with the terms of it; and as the minor had failed to serve out the term, no compensation was due on the contract.

[98] *Missouri:* Lowe *v.* Sinklear, 27 Mo. 308, 72 Am. Dec. 266.

Vermont: Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690; Hoxie *v.* Lincoln, 25 Vt. 206 (but see Mecker *v.* Hurd, 31 Vt. 639).

[99] *Maine:* Derocher *v.* Continental Mills, 58 Me. 217, 4 Am. Rep. 286.

bound by the contract for service, as for instance, in States where he is allowed to make a binding contract of apprenticeship or in any State where the contract is made for him by his parent or guardian. In such a case the recovery by or against the infant is as in ordinary cases.[100]

§ 673b. Services rendered under an agreement within the statute of frauds.

Where services are rendered under a contract for compensation which is void by the statute of frauds, the plaintiff is entitled to recover compensation.[101] If the contract, being void, is repudiated by the employer, who discharges the plaintiff, the latter is entitled to recover the entire value of his services up to the time of his discharge without regard to the contract price.[102] But if the contract has been fully carried out by the

New York: Whitemarsh *v.* Hall, 3 Denio, 375.

[100] Services rendered under valid contract of apprenticeship; no compensation can be recovered on a *quantum meruit:* Olney *v.* Myers, 3 Ill. 311, 35 Am. Dec. 110.

Services rendered under contract with parent:

Delaware: Rodman *v.* Woolman, 2 Houst. 581 (rescission by mutual consent; recovery for services before rescission at contract rate).

Iowa: Lowen *v.* Crossman, 8 Iowa, 325 (contract broken by son; reduce compensation for services performed by damages for breach).

Ohio: Abbott *v.* Inskip, 29 Ohio St. 59 (contract legally made with mother of an infant for his services during minority, but void under statute of frauds. By terms of the contract the infant was to get his board, clothes, etc., and on reaching majority was to have a horse. He left during minority, and sued for value of services. *Held,* he could not recover, since the terms of the original contract bound him as to compensation).

In Potter *v.* Greene, 39 Hun (N. Y.), 72, it appeared that an infant might make a valid contract of apprenticeship. Here he was illegally indentured by others and claimed to have been compelled by force to stay with the defendant. *Held,* if he remained voluntarily, although the indenture itself was not legal, he would be bound by the agreement as one he had voluntarily accepted; but if he was compelled by force to remain and perform the agreement, then he was not bound by it and might recover compensation for the services.

[101] *Florida:* Bucki *v.* McKinnon, 37 Fla. 391, 20 So. 540.

Kansas: Wonsettler *v.* Lee, 40 Kan. 367, 19 Pac. 862.

Maryland: Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709.

Massachusetts: Hill *v.* Hooper, 1 Gray, 131.

Michigan: Cadman *v.* Markle, 76 Mich. 448.

Nevada: Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New York: Hartwell *v.* Young, 67 Hun, 472, 22 N. Y. Supp. 486.

See on this subject in general *ante,* § 651.

[102] *Florida:* Mills *v.* Joiner, 20 Fla. 479.

plaintiff and nothing is left to be done but payment by the defendant, it is sometimes held that the amount of recovery for value of the services would be limited by the price fixed in the contract.[103] In other jurisdictions, however, it is held that, the contract being entirely void, the contract price is immaterial and the plaintiff may recover the actual value of his services on a *quantum meruit*.[104] In a few cases it has been held or intimated that if the plaintiff in breach of the terms of the oral agreement left the employment before the performance was completed, he would be entitled to no compensation;[105] but this view is questionable, since the contract is in no respect binding on the plaintiff.

§ 673c. Services rendered under a void agreement.

Where the servant serves under a contract or other obliga-

Illinois: William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560; Schanzenbach *v.* Brough, 58 Ill. App. 526.

Vermont: Stone *v.* Stone, 43 Vt. 180.

In *Minnesota* a different doctrine prevails. It is held that even if the plaintiff was wrongfully discharged he could recover at no greater than the contract rate, such being settled doctrine of the court although in the actual case the doctrine was stated by the court to be unsatisfactory. Spinney *v.* Hill, 81 Minn. 316, 84 N. W. 116.

[103] *Connecticut:* Clark *v.* Terry, 25 Conn. 395.

Illinois: Swanzey *v.* Moore, 22 Ill. 63, 74 Am. Dec. 134 (*semble*).

Minnesota: Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846.

New York: King *v.* Brown, 2 Hill, 485; Nones *v.* Homer, 2 Hilt. 116; Porter *v.* Dunn, 61 Hun, 310, 16 N. Y. Supp. 77. But see Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563.

In La Du-King Manuf. Co. *v.* La Du, 36 Minn. 473, 31 N. W. 938, the plaintiff was treasurer of a corporation for five years, to be paid by a share of the profits. The contract was void by the statute of frauds. He served for three years, and then left on account of illness. It was held that he could recover, but it must be on the terms of the contract so far as that had been carried out by both parties. As no profits had been realized, he could recover no compensation as yet, but it was intimated that if profits were afterwards realized during the five years he might sue for them.

[104] *Indiana:* Wallace *v.* Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666.

Kentucky: Thomas *v.* McManus, 23 Ky. L. Rep. 837, 64 S. W. 446.

Massachusetts: Seemore *v.* Bennet, 14 Mass. 266, 7 Am. Dec. 213.

Michigan: Leslie *v.* Smith, 32 Mich. 64.

New Hampshire: Emery *v.* Smith, 46 N. H. 151.

Wisconsin: Koch *v.* Williams, 82 Wis. 186, 52 N. W. 257.

[105] *Illinois:* Swanzey *v.* Moore, 22 Ill. 63, 74 Am. Dec. 134.

Minnesota: Kriger *v.* Leppel, 42 Minn. 6, 43 N. W. 484.

See Clark *v.* Terry, 25 Conn. 395.

tion which proves to be void, he is entitled to recover the value of his service on a *quantum meruit ;* [106] and so where the performance of the service by the servant is obtained by fraud of the master, who by his fraud induces the servant to serve gratuitously, the servant on discovering the fraud is entitled to recover the value of his services.[107] Where, however, the contract is not merely void but is illegal as regards both parties, there can be no recovery.[108]

§ 673d. Services voluntarily rendered.

Where a person voluntarily renders services for another without request and with no expectation of being paid, he cannot recover compensation for the value of his services.[109] A common example occurs when a child after he becomes of age, or a stranger voluntarily received into a family, renders ordinary domestic services for the family. In the absence of some special circumstances showing that such services were rendered with the expectation of compensation on both sides, these are regarded as voluntary services not entitled to compensation.[110]

[106] *New York:* Lewis *v.* Trickey, 20 Barb. 387 (service under void contract of apprenticeship).

Tennessee: Guadelupo y Calvo Mining Co. *v.* Beatty, 3 Tenn. Cas. 271 (service under contract with corporation not binding on the corporation).

Wisconsin: Martin *v.* Estate of Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895 (service as adopted child; the adoption proving invalid).

[107] *Mississippi:* Williams *v.* Luckett, 77 Miss. 394, 26 So. 967 (woman fraudulently induced to enter into invalid marriage).

Missouri: Hickam *v.* Hickam, 46 Mo. App. 496 (slave kept at service in ignorance of emancipation).

[108] *Massachusetts:* Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. 1020 (service on Sunday).

Missouri: Barney *v.* Spangler, 131 Mo. App. 58, 109 S. W. 855 (service on Sunday).

Nebraska: Richardson *v.* Scott's Bluff County, 59 Neb. 400, 81 N. W. 309, 80 Am. St. Rep. 682 (lobbying).

[109] *Missouri:* Lynch *v.* Bogy, 19 Mo. 170; Kerr *v.* Cusenbary, 60 Mo. App. 558.

New York: Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237.

South Carolina: Hort *v.* Norton, 1 McCord, 22.

[110] In the case of a child it is very clear that if after coming of age he continues to perform the same services he had performed as minor, there is no claim for compensation in the absence of affirmative evidence of an agreement to that effect:

Iowa: Scully *v.* Scully, 28 Iowa, 548.

New York: Ulrich *v.* Ulrich, 60 N. Y. Super. Ct. 237, 17 N. Y. Supp. 721.

And where a young person is received into the house of a relative and treated as a child he can recover no compensation.

Another example of services which are presumably gratuitous is afforded by the case of extra work done outside the regular or statutory hours by a workman. Where a workman is employed on a day's work which is limited to a certain number of hours, and without an express agreement for compensation he performs service in excess of the proper number of hours, it is held that he is entitled to no extra compensation.[111] And if a workman is entitled to a vacation with full pay and he does not take a vacation, he is not entitled to extra compensation.[112] Another example is the case of a director of a corporation who performs special services for the corporation. So long as there is no special vote passed before his performance of the services by virtue of which he is to be compensated and the services are not of such a nature as would ordinarily be outside the scope

Missouri: Sloan *v.* Dale, 90 Mo. App. 87 (niece).

North Carolina: Dodson *v.* McAdams, 96 N. C. 149, 60 Am. Rep. 408 (grandchild).

Pennsylvania: Defrance *v.* Austin, 9 Pa. 309 (nephew).

The same thing is true where a minor resides in the house of a stranger as a member of his family and is treated in all respects as a child.

Indiana: Waechter *v.* Walters, 41 Ind. App. 408, 84 N. E. 22.

Iowa: Smith *v.* Johnson, 45 Iowa, 308.

Pennsylvania: Zimmerman *v.* Zimmerman, 129 Pa. 229, 18 Atl. 129, 15 Am. St. Rep. 720.

Rhode Island: Newell *v.* Lawton, 20 R. I. 307, 38 Atl. 946.

If, on the other hand, an adult stranger is serving in a family as a member of the household, he is presumptively entitled to compensation for it. Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650.

And in one case where a person was taken as a child into the family of a stranger and remained until she was twenty-four years old, performing domestic services, and was then turned off, it was held that presumptively these services were entitled to compensation. Coleman *v.* Simpson, 2 Dana (Ky.), 166.

[111] *United States:* U. S. *v.* Martin, 94 U. S. 400, 24 L. ed. 128.

Connecticut: Luske *v.* Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314.

Illinois: Christian County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479; Sanitary Dist. *v.* Burke, 88 Ill. App. 196.

Indiana: Grisell *v.* Noel Brothers Flour Feed Co., 9 Ind. App. 251, 36 N. E. 452.

Michigan: Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

Missouri: Barney *v.* Spangler, 131 Mo. App. 58, 109 S. W. 855.

New Hampshire: Brooks *v.* Cotton, 48 N. H. 50.

New York: McCarthy *v.* Mayor, 96 N. Y. 1, 48 Am. Rep. 601; McGraw *v.* Gloversville, 32 App. Div. 176, 52 N. Y. Supp. 916.

An express statute may of course make it the duty of a municipal corporation to pay at a certain rate for an eight hour day and in that case the town must pay extra for a longer time of service. Gilligan *v.* Waterford, 91 Hun, 21, 36 N. Y. Supp. 88.

[112] Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

of a director's activities, they are presumably voluntary services and he is entitled to no compensation for them.[113] On this principle where a slave went with his master into free territory and there continued to serve his master in the free territory it was held that he was entitled to no compensation since the services were rendered without the expectation of compensation.[114]

§ 673e. Services outside the scope of employment.

Where a person employed for a certain service renders services entirely outside the scope of his employment, which are received by the employer, these are presumptively rendered for compensation and the person who renders them is entitled to recover extra compensation.[115] So where a director of a corporation performs extraordinary services entirely outside the scope of his duties as director, he may recover compensation for such extraordinary services; [116] as, for instance, where a director performs services as attorney or land commissioner.[117]

[113] *Illinois:* Brown *v.* De Young, 167 Ill. 549, 47 N. E. 863; Jones *v.* Vance Shoe Co., 92 Ill. App. 158.

Massachusetts: Pew *v.* First Nat. Bank, 130 Mass. 391.

Missouri: Besch *v.* Western C. M. Co., 36 Mo. App. 333; Pfeiffer *v.* Lansberg Brake Co., 44 Mo. App. 59; Rose *v.* Eclipse Carbonating Co., 60 Mo. App. 28; Remmers *v.* Seky, 70 Mo. App. 364; Beach *v.* Stouffer, 84 Mo. App. 395.

Pennsylvania: Loan Assoc. *v.* Stonemetz, 29 Pa. 534; Martindale *v.* Wilson-Cass Co., 134 Pa. 348, 19 Atl. 680, 19 Am. St. Rep. 706.

[114] Alfred *v.* Fitzjames, 3 Esp. 3.

[115] *Indiana:* Martin *v.* Prince, 12 Ind. App. 213, 40 N. E. 33 (plaintiff employed as farm hand at $1.00 per day; at request of defendant he rendered services as nurse at night. *Held*, not necessary to assume that they were rendered as part of the original service).

New York: Merzbach *v.* Mayor, 10 Misc. 131, 30 N. Y. Supp. 908.

In Ranck *v.* Albright, 36 Pa. 367, it was held that the fact that the employer increased the size of his family by having hired men live with him did not entitle a domestic servant to recover for extra work.

[116] *United States:* National L. & I. Co *v.* Rockland Co., 36 C. C. A. 370, 94 Fed. 335.

California: Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611.

Colorado: Brown *v.* Republican Mountain Silver Mines, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426.

Connecticut: New York *v.* N. H. R. R. *v.* Ketchum, 27 Conn. 181.

Illinois: Rockford, R. I. & S. L. R. R. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587.

Maryland: Santa Clara Mining Assoc. *v.* Meredith, 49 Md. 389, 33 Am. Rep. 247.

New Jersey: Evans *v.* Trenton, 21 N. J. L. (11 Zab.) 769.

Vermont: Henry *v.* Rutland & B. R. R., 27 Vt. 455.

[117] *Minnesota:* Rogers *v.* Hastings & D. Ry., 22 Minn. 25.

And so where one employed as housekeeper renders services as nurse she is entitled to compensation.[118] So where a person holding government office is detailed to perform the duties of an entirely different office in addition to his own, he is entitled to compensation for the extra services.[119] And when the Mayor of a city was employed as attorney in matters in which the city was interested, he was entitled to extra compensation.[120]

§ 673f. Recovery by party in default.

In case a servant who is employed on an entire contract to complete a certain piece of work or to serve during a certain time, voluntarily leaves the service before completing the work or serving during the entire term, he can recover nothing for that portion of the work he has done or the time he has served.[121]

Missouri: Taussig *v.* St. Louis & K. R. R., 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674.

[118] *Kansas:* Houghton *v.* Kittleman, 7 Kan. App. 207, 52 Pac. 898.

See, however, *Pennsylvania:* Rosencrance *v.* Johnson, 191 Pa. 520, 43 Atl. 360.

[119] United States *v.* Brindle, 110 U. S. 688, 4 Sup. Ct. 180, 28 L. ed. 286; Converse *v.* U. S., 21 How. 463, 16 L. ed. 192.

[120] Mayor *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

[121] Plaintiff left before the expiration of the term of service:

Alabama: Whitley *v.* Murray, 34 Ala. 155.

Colorado: Cody *v.* Raynaud, 1 Colo. 272.

District of Columbia: Lewis *v.* Esther, 2 Cranch C. C. 423.

Hawaii: Hanuu *v.* Williams, 2 Hawaii, 233.

Illinois: Dunn *v.* Moore, 16 Ill. 151; Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161; Hansell *v.* Erickson, 28 Ill. 257.

Indiana: DeCamp *v.* Stevens, 4 Blackf. 24.

Massachusetts: Stark *v.* Parker, 2 Pick. 267, 13 Am. Dec. 425; Thayer *v.* Wadsworth, 19 Pick. 349; Davis *v.* Maxwell, 12 Met. 286.

Missouri: Aaron *v.* Moore, 34 Mo. 79.

New Jersey: Ewing *v.* Ingram, 24 N. J. L. (4 Zab.) 520.

New York: Reab *v.* Moor, 19 Johns. 337; Marsh *v.* Rulesson, 1 Wend. 514; Lantry *v.* Parks, 8 Cow. 63.

Ohio: Snyder *v.* Walker, 13 Ohio C. Ct. 93.

Tennessee: Hughes *v.* Cannon, 1 Sneed, 622; Halloway *v.* Lacy, 4 Humph. 468; Abernathy *v.* Black, 2 Cold. 314, 88 Am. Dec. 598.

Vermont: St. Albans Steam Boat Co. *v.* Wilkins, 8 Vt. 54; Brown *v.* Kimball, 12 Vt. 617.

Wisconsin: Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57; Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865.

Plaintiff ceased to work before doing all the work:

Missouri: Hinson *v.* Hampton, 32 Mo. 408 (to serve during voyage; left before end of voyage).

England: Bates *v.* Hudson, 6 Dowl. & R. 3 (to cure all sheep of a flock; succeeded in curing part only).

So in a strong case where a seaman was employed upon a certain voyage and was to assist in discharging the cargo at the end of the voyage and he voluntarily left at the end of the voyage without excuse before the cargo was discharged, it was held that he was entitled to no wages for the voyage.[122] If, however, wages are payable in instalments the servant may recover the instalments which were due at the time of leaving; [123] and so where the parties had entered into a settlement and had agreed upon the amount due and the employer had given a note for the amount and the servant afterwards left without excuse, it was held that he would not forfeit the amount due him on the note.[124]

If the master waives the breach by agreeing to pay wages due, notwithstanding the voluntary breach of the plaintiff, the servant may recover, and it is said that slight evidence of such an agreement will be accepted by the court as such a waiver.[125]

In jurisdictions following the case of Britton *v.* Turner,[126] the servant who leaves prematurely is entitled to recover the amount of the benefit he has conferred upon his employer which will be measured by the value of his work less the damage caused by his breach of the contract.[127]

§ 674. Remedy of master for improper service.

Improper service, contrary to the terms of the employment,

[122] Webb *v.* Duckingfield, 13 Johns. (N. Y.) 390, 7 Am. Dec. 388.

[123] *Vermont:* Winn *v.* Southgate, 17 Vt. 355, 98 Am. Dec. 564 (could keep payments already made).

England: Taylor *v.* Laird, 1 H. & N. 266 (could recover payments due).

But see McMillan *v.* Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299 (agreement to serve for a certain time to be paid by the piece; plaintiff left before end of time. *Held*, he could not recover for what he had done according to the price set by the piece. The court pointed out that labor might be worth a good deal more at one time in the year than in another).

[124] Thorpe *v.* White, 13 Johns. (N. Y.) 53.

[125] *California:* Hogan *v.* Titlow, 14 Cal. 255.

Vermont: Cahill *v.* Patterson, 30 Vt. 592.

[126] *Ante*, § 660.

[127] *Iowa:* Pixler *v.* Nichols, 8 Iowa, 106, 74 Am. Dec. 298; Tait *v.* Sherman, 10 Iowa, 60; Powers *v.* Wilson, 47 Iowa, 666.

Louisiana: Taylor *v.* Peterson, 9 La. Ann. 251; Kessee *v.* Mayfield, 14 La. Ann. 90.

Tennessee: Congregation of Children of Israel *v.* Peres, 2 Cold. 620.

Texas: Riggs *v.* Horde, 25 Tex. Supp. 456, 78 Am. Dec. 584.

Wisconsin: Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 180, 85 N. W. 268.

may be cause for dismissal and if the master discharges the servant for good cause the servant can recover nothing for his services.[128] If, however, wages were payable by instalments the servant forfeits only such wages as have accrued since the last pay day.[129] In jurisdictions following the doctrine of Britton *v.* Turner,[130] however, the servant who is discharged for cause may recover on a *quantum meruit* the value of his services,[131] and indeed this is allowed in some jurisdictions which do not allow a recovery of wages in case the servant voluntarily leaves the employment, the ground for distinction as given being that in the latter case it is the servant's fault and no injustice is done him in requiring him to forfeit his wages.[132]

If the master chooses not to discharge the servant but to continue him in the employment in spite of his breach of agreement, damages for improper service may be recouped against the servant's claim for wages.[133]

Breach of obligation on the part of the servant may also be

[128] *California:* Hartman *v.* Rogers, 69 Cal. 643, 11 Pac. 581.

Georgia: Henderson *v.* Stiles, 14 Ga. 135.

Pennsylvania: Libhart *v.* Wood, 1 W. & S. 265, 37 Am. Dec. 461; Williams *v.* Eldridge, 9 Kulp, 566.

England: Spain *v.* Arnot, 2 Stark. 256; Atkin *v.* Acton, 4 C. & P. 208; Turner *v.* Robinson, 6 C. & P. 15

[129] *New Jersey:* Beach *v.* Mullin, 34 N. J. L. 343.

Ohio: Voelckel *v.* Banner Brewing Co., 9 Ohio C. Ct. 318.

England: Ridgway *v.* Hungerford Market Co., 3 A. & E. 171.

[130] *Ante,* §§ 658–662.

[131] *Indiana:* Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079.

Maryland: Mallonee *v.* Duff, 72 Md. 283, 19 Atl. 708.

Mississippi: Hariston *v.* Sale, 6 Sm. & M. 634; Robinson *v.* Sanders, 24 Miss. 391.

Missouri: Lamb *v.* Brolaski, 38 Mo. 51.

So where the employer accepts the performance as the best he can get. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

[132] *Maine:* Lawrence *v.* Gullifer, 38 Me. 532.

Tennessee: Massey *v.* Taylor, 5 Cold. 447, 98 Am. Dec. 429.

[133] *California:* Kalkman *v.* Baylis, 17 Cal. 291; E. E. Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336 (recoupment though master sold the product of the labor without deduction for the defect).

Connecticut: Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246 (seduction of employer's daughter).

Georgia: Lee *v.* Clements, 48 Ga. 128.

Illinois: Ward *v.* Salisbury, 12 Ill. 369.

Michigan: Alberts *v.* Stearns, 50 Mich. 349, 5 N. W. 505.

Mississippi: Dunlap *v.* Hand, 26 Miss. 460; Harper *v.* Ray, 27 Miss. 622 (burden on employer to prove amount).

New York: Still *v.* Hall, 20 Wend. 51; Allaire Works *v.* Guion, 10 Barb. 55 (malicious destruction of property).

North Carolina: Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783 (by plain-

an independent cause for the recovery of damages by the master. Thus, a servant may be sued by his master for improperly performing his work,[134] or for failure to complete the term of service agreed upon in the contract.[135] In the latter case the measure of damages is the difference between the contract price and the amount which the employer has to pay to procure the work done elsewhere.[136] So where the servant's breach consisted in a temporary unexcused absence from service instead of service which was bad in quality, the master may bring suit and recover damages.[137]

§ 675. Consequential damages.

Where the mate of a vessel was unlawfully wounded by the

tiff's negligence fires were set and defendant's timber destroyed).

Vermont: Morris *v.* Redfield, 23 Vt. 295.

In Duncan *v.* Blundell, 3 Stark. 6, it was held that one who undertakes work and because of lack of skill fails to do it properly cannot recover compensation.

Damages so recouped must be sufficiently certain; no speculative damages may be recovered. Weymer *v.* Belle Plaine Broom Co. (Ia.), 132 N. W. 27.

[134] *United States:* Forman *v.* Miller, 5 McLean, 218 (measure of damages, difference in value of the product as it should have been and as it was).

Massachusetts: Corey *v.* Eastman, 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401.

[135] *Iowa:* Riech *v.* Bolch, 68 Iowa, 526, 27 N. W. 507.

Kentucky: Fuqua *v.* Massie, 95 Ky. 387, 393, 25 S. W. 875.

Mississipii: Pritchard *v.* Martin, 27 Miss. 305.

[136] *Colorado:* Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

New York: Peters *v.* Whitney, 23 Barb. 24.

Where the place of the servant is not or cannot be supplied, the value of his services to the master may be recovered. Myers R. S. Co. *v.* Griswold, 77 Neb. 487, 109 N. W. 736.

In Riech *v.* Bolch, 68 Iowa, 526, 27 N. W. 507, plaintiff, employed by defendant as a farm hand, left in the middle of the haying season. *Held,* the loss of the hay by reason of his leaving was too remote to be charged to him. *Quære* as to the correctness of this decision.

[137] Ayling *v.* London & India Docks Committee, 9 T. L. Rep. 409 (plaintiff left the employment without notice on a strike. The strike having been settled he came back to work. *Held,* that the employer might obtain damages for the wrongful interruption in the service); Bowes *v.* Press, 10 T. L. Rep. 55 (defendant, employed as a miner, refused to go down into the mine and work with a non-union man, and this refusal continued for several days. *Held,* a breach of the contract for which the employer could get damages).

In Prentiss *v.* Ledyard, 28 Wis. 131, the plaintiff was to receive a certain amount for services if he continued temperate. He occasionally became drunk, but was retained in the service. *Held,* if he was retained in the service that was a waiver of the condition and he could recover.

master in a foreign port during a voyage for which he had shipped, and was in consequence taken on shore, detained there, and subjected to medical treatment, it was held in an action against the owners for the breach of the shipping articles that his compensation for lost time was not restricted to the period of the contract. He was entitled to damages equivalent to the injury, which included wages for such reasonable time as was lost by his detention, and till he could return home, besides the medical and other expenses necessitated by the wound.[138]

In an English case, the plaintiff shipped as a seaman at a certain monthly rate of wages for a commercial voyage, not to exceed twelve months, to Rio and elsewhere, and to end by his being brought back to some port in the United Kingdom, or on the continent of Europe between Elbe and Brest. On arriving at Rio the defendant proceeded to employ his vessel as a ship of war in the service of the Peruvian government. The plaintiff thereupon refused to proceed any further with the voyage, on the ground that it was illegal, and exposed him to risks not contemplated by his contract, left the ship and went on shore. There he was arrested as a Peruvian deserter and committed to prison, where he remained some days. On coming out he found that the ship had sailed, taking his clothes and other articles which he had left on board. In an action for damages for the breach of contract the jury found a verdict for the plaintiff, and assessed the damages for the breach under three heads, namely: First, £12 10*s*. for loss of wages under the contract; second, £20 for loss of clothes; third, £30 for general damages for the imprisonment and otherwise by reason of the defendant's breach. It was held that the damages under the second and third heads were too remote.[139]

It was held in Missouri, in a case not very fully reported,[140] where a hand employed on board a steamboat at a stipulated

[138] Croucher *v.* Oakman, 3 All. (Mass.) 185.

[139] Burton *v.* Pinkerton, L. R. 2 Ex. 340. But see Hunt *v.* Colburn, 1 Sprague, 215. In that case, where the facts were similar, it was held that the plaintiff might recover for the loss of clothes carried off in the vessel; and being detained by sickness in the foreign port, he was also allowed wages during the time of his detention and passage-money home.

[140] Cunningham *v.* Steamboat Low Water, 28 Mo. 338.

rate of wages for a trip, was discharged and put off the boat without cause before the end of the trip, and the boat, owing to an accident to her machinery, was detained for some days beyond the regular period of her trips, that he could recover wages only for the time usually consumed in a trip, and not for that of the additional detention. This decision seems to admit of question, and not to be fully borne out by the case of the Elizabeth,[141] which is referred to as authority for it. That case decided that when a ship bound to St. Petersburg from Portsmouth and back had met with an accident, the repairs necessitated by which detained her in a northern port where she would have been blocked up by the ice and detained all the winter, the master had a right to discharge his crew, on condition of paying their passage back to England and wages up to the time of such return. This was a reasonable and justifiable course, and furnished the crew with a full and fair indemnity, which in the other case the boat hand failed to receive. To bring the latter case within the authority or analogy of the former, the hand should have been brought or sent back to the place where he was shipped, or indemnified for the expense of getting there, and have received wages for the time required for his return.

In an action by a domestic servant for wages, evidence was given tending to show that the plaintiff had been dismissed from the defendant's residence in the country between eleven and twelve o'clock at night, and was left all night in the space between the hall door and the outer gate. The plaint contained a count for wrongful dismissal, with an averment of special damages. The jury, under this count, found for the plaintiff, with £20 damages, ten shillings of which only were for wages due, and £19 10*s*. were for the injury suffered by the plaintiff from the circumstances of the dismissal. The defendant having moved to reduce the verdict to ten shillings, the court granted the motion, holding that under the pleadings the plaintiff was entitled only to the wages due her by the contract of hire, and "could not recover as special damage in respect of any matters save such as would not have happened to her had the contract been fulfilled by payment of those moneys at the

[141] 2 Dods. Adm. 403.

time of her dismissal." Mr. Baron Deasy, however, inquired of the plaintiff's counsel whether they could not frame a count upon the implied duty of a master to his servant that would meet such a case.[142] And in a Texas case such damages were allowed in an action for breach of contract. Plaintiff was employed to work for defendant at a distant point. He went there and was then refused employment and was left without food or lodging and suffered from hunger and cold. It was held that the plaintiff was entitled to secure as direct damages the wages he would have earned under the contract, provided he showed that he used due diligence in obtaining other employment and failed to do so, or if he did obtain other employment, deducting the amount thereby realized; and that he could also recover damages for his sufferings from cold and hunger.[143] Where a servant is wrongfully discharged, he may recover the expense of obtaining a new employment.[144]

No damages can be recovered because of loss of earnings or gratuities from others which plaintiff would have received if he had continued in the employment,[145] or because the fact of his having been dismissed made it more difficult to obtain other employment.[146]

No special damages can be recovered unless they are claimed in the declaration.[147]

§ 675a. The English workmen's compensation act.

Under the Workmen's Compensation Act (6 Edw. 7, c. 58), which went into effect July 1, 1907, an employer is made to bear a large part of the burden of unavoidable accidents or of diseases peculiar to the employment, resulting in the temporary or permanent incapacity of his workmen or in death, and even of injuries founded on their serious and wilful misconduct, if causing death. Elaborate provision is made for the determination by judges, arbitrators, committees of employers and employed, and the parties themselves of questions of law and fact arising under the act.

[142] Breen *v.* Cooper, Ir. R. 3 C. L. 621.

[143] Gulf, C. & S. F. Ry. *v.* Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89.

[144] *Ante*, § 667.

[145] Tucker *v.* Horn, 31 Ky. L. Rep. 805, 103 S. W. 717.

[146] Addis *v.* Gramophone Co. [1909], A. C. 488.

[147] Lufkin *v.* Patterson, 38 Me. 282.

The measure of recovery for incapacity and death are fixed with reference to the earnings of the workman affected and the extent of others' dependence upon him. Where incapacity for work results from the injury, the employer is called upon to make weekly payments not exceeding in amount 50% of the workman's average weekly earnings during the twelve months preceding the injury. No weekly payment is to equal more than £1. If the workman at the time of the injury be less than 21 years of age and his weekly earnings be less than 20 shillings, recovery may be had in a sum equal to 100% of their amount, with the proviso that no payment for injuries to a minor shall equal more than 10 shillings weekly. In estimating the amount of weekly payments to which a workman is entitled, suitable deduction is made on account of allowances and benefits received from the employer during the period of incapacity apart from the Act and for earnings, if the incapacity be partial only and there is provision for the redemption of long-continued weekly payments by the discharge of the whole obligation in one lump sum.

If the injury be fatal and the workman leave persons wholly dependent upon himself, his employer is obligated to pay a sum equal to the workman's earnings during the preceding three years, but no more than £300, or £150 if such sum be less than £150. Where the deceased leaves persons partially dependent upon himself, the employer is called upon to pay a sum reasonable and proportionate to the loss sustained by them, such sum to be in no case greater than what would have been the extent of his liability in case the beneficiaries had been wholly dependent. If a workman die without dependents, the employer is made liable to pay the reasonable expenses of medical attendance and burial, in a sum not exceeding £10.

Weekly earnings and earnings, within the contemplation of the act, may have, as the basis for the estimation of the amounts due in weekly payments or of a lump sum at death, a wider meaning than wages merely; for example, the terms have been held to include the fees of a waiter,[148] and a seaman's board and lodging.[149] A complete discussion of the elaborate processes of

[148] Renn *v.* Spiers [1908], 1 K. B. 766.

[149] Rosenquist *v.* Bowring, 24 T. L. R. 504.

estimating earnings in cases where the employee has been within the periods named in the act, only casually employed or employed in different grades of work, or employed by several masters, will be found in the important decision of Perry *v.* Wright,[150] and of the several cases decided with it.

Where the defendant was ordered to make weekly payments to the workman, these payments will be continued, even though the physical injury is entirely cured if mental and nervous suffering continues.[151]

[150] [1908] 1 K. B. 441. The consideration of this Act, and of the similar American acts, as well as of the Employers' Liability Acts (*e. g.*, the English Act of 1880; 43 and 44 Vict., c. 42) fall entirely outside the scope of the present edition of this work.

[151] Eaves *v.* Blaenclydach Colliery Co., [1909] 2 K. B. 73.

CHAPTER XXXII

ACTIONS UPON BONDS

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692k. Bonds of guardians.
693. Bonds of county and town officers.
694. Bonds of officers of corporations.

A.—Bonds in General

§ 675b. Debt on bond.

*Of all forms of debt, that of debt on bond was the most frequent. In the early periods of our jurisprudence debt was the common action for goods sold and delivered, and for work and labor done; but it was subsequently to a great extent superseded by the proceeding in assumpsit.[1]

It is true, as a general rule, that in the action of debt, which was brought for the recovery of a sum certain, no damages could be claimed on account of the debt itself, this being recoverable *in numero;* but damages were given on account of the detention of the debt. In an action of debt on bond, therefore, only nominal damages were assessed, nor was it in general necessary to have them assessed to the amount even of what was due for interest, because, as under the verdict, the plaintiff was entitled to the whole penalty; this, which is double the sum mentioned in the condition, was usually sufficient to cover what was due for interest.

The form of the *obligation* or *bond* of the English law is technical and peculiar. The obligor *binds*, or *obliges* himself to pay a certain sum of money, at a certain time, to the obligee; This, if under seal, would be a single bond, or *simplex obligatio*, and would only differ from a note, in being under seal, and not negotiable. But in the bond we find a clause appended, declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part, or *condition*, of the bond, is that which

[1] Rudder *v.* Price, 1 H. Bl. 547.

discloses the real nature of the contract, and contains its essence; the former part is the *penalty*.[2] *Penal obligations* are well known to other systems of law besides our own; [3] but the precise form of contract by which an absolute obligation is at first declared, and this converted into a mere penalty by the addition of a subsequent condition, is entirely peculiar to the English law.

From this form of obligation or contract, various results, flowing from the technical rules of the common law, were deduced by the founders of our jurisprudence. If the condition was not strictly complied with, as in regard to the payment of money on a day certain, the moment the day was passed the penalty became the debt, and was at law recoverable; and neither payment nor tender after the day would avail, because a condition once broken was gone forever. If the condition were to do anything other than pay money, and were not fulfilled, the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. Hence many difficulties arose. Lord Kaimes says,[4] that the bond was introduced originally to evade the common law of England, which prohibited the taking interest for money. Whatever reason led to its introduction, certain it is, that its peculiar form has occasioned infinite doubt and contradiction.**

§ 675c. Damages less than the penalty.

* The action of debt, as has been said, was the usual remedy provided by the common law for the recovery of a sum certain. And in an action of debt for condition broken, the amount of the plaintiff's recovery was originally, as has also been said, the penalty; nor could the action be relieved against, either by payment or tender: no defense would avail but a release under seal. And this severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed, and would not allow a man to take more than in conscience he ought.[5] It became early settled in equity, that the

[2] Black. Com. ii, ch. 20, p. 340.

[3] Pothier, Traité des Obligations, part ii, ch. v, des Obligations Penales.

[4] Prin. of Equity, book iii, ch. ii, p. 279.

[5] Black. Com., book ii, ch. 20, p. 341.

condition of the bond was the agreement of the parties, and as such the obligor was relieved from the penalty.[6] Lord Somers said,[7] "that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of Chancery would relieve, though the letter of it were not strictly performed, as payment of money, etc. But where the condition was collateral and in recompense, and no value could be put on the breach of it, then no relief could be had for the breach of it." This practice was followed by the common-law tribunals, which ordered the proceedings to be stayed upon bringing into court the principal debt, interest, and costs.[8] Finally, this discretionary power was confirmed by a statutory regulation, which provided that in actions on bonds with penalties, the defendant might bring in the principal debt, interest, and costs, and be discharged.[9]

This legislation was followed in this country. In New York,[10] it was declared that, in actions on penalty bonds, the plaintiff might plead payment of the debt made before suit brought, though not according to the condition; and that after suit brought, the defendant might bring debt, principal, and costs into court, and that thereupon the action should be discontinued. Speaking of the English original of this statute, Lord Mansfield said: [11]

"That it was made to remove the absurdity which Sir Thomas More unsuccessfully attempted to persuade the judges to remedy in the reign of Hen. VII.; for he summoned them to a conference concerning the granting relief at law, after the

For cases of this description in chancery see Hale *v.* Thomas, 1 Vern. 349, and Stewart *v.* Rumball, 2 Vern. 509; also, Duvall *v.* Price, Show. Par. Cas. 15; Bond and Penalty, Abr. Eq. 91, 92.

[6] Acton *v.* Pierce, 2 Vern. 480; Cannel *v.* Buckle, 2 P. Wms. 243; Watkyns *v.* Watkyns, 2 Atk. 96; Bishop *v.* Church, 3 Atk. 691; Parks *v.* Wilson, 10 Mod. 515; Hobson *v.* Trevor, 2 P. Wms. 191; Chilliner *v.* Chilliner, 2 Ves. 528; Collins *v.* Collins, 2 Burr. 820. See Pothier, by Evans, on Penal Obligations, Appendix, and Fonblanque's Treatise on Equity.

[7] Prec. in Ch. 487.

[8] Gregg's Case, 2 Salk. 596; Anon., 6 Mod. 11; Butler *v.* Rolfe, Ibid. 25; Anon. Ibid. 29; Burridge *v.* Fortescue, Ibid. 60, and Ireland's Case, Ibid. 101. In Burridge *v.* Fortescue, the court said: "It is an equitable motion, to be relieved against the penalty."

[9] 4 and 5 Anne, ch. 16, §§ 12 and 13.

[10] Rev. Stat., vol. ii, p. 353, §§ 12 and 13, superseded by the provisions of the Code Civ. Proc., § 1915.

[11] Wyllie *v.* Wilkes, 2 Doug. 519.

forfeiture of bonds, upon payment of principal, interest, and costs, and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction."

And in another case,[12] he said:

"It was extraordinary that after it was settled in *equity* that the forfeiture might be saved by the performing the intent, and that this was the nature of a bond, the courts of law did not follow equity, but still continued to do *injustice as of course*, and put the parties to the delay and expense of setting it right *elsewhere as of course*." [13]

§ 675d. Assignment of breaches.

Notwithstanding this statute, however, it is apparent that great injustice might be committed, because the plaintiff was entitled to judgment for the whole amount of the penalty, and the defendant could only be discharged by addressing himself to the equitable consideration of the court. Hence was imposed the obligation to *assign breaches*. By a statute enacted at nearly the same time,[14] it was declared "that in all actions, etc., upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing certain, the plaintiff or plaintiffs *may* assign as many breaches as he or they shall think fit; and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of said breaches so to be assigned as the plaintiff on the trial of the same shall prove to have been broken." The language here is, that the plaintiff *may* assign breaches; but it was settled that the statute was compulsory,[15] and that a judgment obtained under the former practice of the common law was bad in error. In the case last cited, Lord Kenyon and Mr. J. Buller said:

"It is apparent to us that the law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs

[12] Bonafous *v.* Rybot, 3 Burr. 1370, 1374.

[13] In this last case it was held that bonds conditioned for payment of money by instalments were within the act of 4 Anne.

[14] 8 and 9 Will. III, ch. xi, § 8.

[15] Roles *v.* Rosewell, 5 T. R. 538, and Hardy *v.* Bern, Ibid. 636.

relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what is in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued."

And it was accordingly held, that the plaintiff *must* assign breaches, and that the jury *must* assess the damages.

The principles of this act were engrafted upon the legislation of this country. In New York it was provided:[16]

"When an action shall be prosecuted in any court of law, upon any bond, for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff *in his declaration* shall assign the specific breaches for which the action is brought.

"Upon the trial of such action if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.

"In every such action, if the plaintiff recover, the verdict of the jury assessing the plaintiff's damages shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited as in other actions of debt, together with costs of suit; and with a further judgment that the plaintiff have execution to collect the amount of the damages so assessed by the jury, which damages shall be specified in such judgment."

§ 675e. Only the plaintiff's actual loss now recoverable.

These two statutes together produced this reasonable and equitable result, that in the case of an agreement to do or refrain from doing any particular act secured by a penalty, the amount of the penalty was in no sense the measure of compensation; and the plaintiff must show the particular injury of

[16] Revision of 1813 (R. Laws, vol. i, p. 518), and Revised Statutes, vol. ii, p. 300, 2d ed.; 378, 1st ed. Now superseded in New York by the provisions of the Code Civ. Proc., § 1915.

which he complains, and have his damages assessed by the jury. It, therefore, became a settled rule that no other sum can be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss.[17] **

§ 676. Penalty and liquidated damages.

As has already been said [18] the sum named in a bond as the amount of the debt (commonly called the "penal sum" of the bond) is *prima facie* named as a penalty, and not as liquidated damages for breach of the condition, and the plaintiff is not entitled to recover the amount in an action for the breach.[19] It is possible, however, to show in any particular case that the penal sum was really intended to be recovered as liquidated damages,[20] as for instance in the case of a bond conditioned on paying an amount of money exactly equal to the penal sum named.[21]

[17] Consequently where a judgment has been recovered in one State for the amount of the penalty of a bond, a plaintiff suing on such judgment in another State can recover the amount of damages only for which execution was awarded in the original suit. Battey *v.* Holbrook, 11 Gray (Mass.), 212. In an action of debt on bond, conditioned for the support of the plaintiff and her husband during their lives, it was held that damages must be assessed so as to cover not only present but prospective loss; the decision being based on the ground that as the bond contained no covenant and there could be but one breach, the plaintiff was entitled to have all her damages assessed on the trial. Philbrook *v.* Burgess, 52 Me. 271.

[18] §§ 389 *et seq.*

[19] *Colorado:* Twick *v.* Marshall S. M. Co., 8 Colo. 113, 5 Pac. 838.

Georgia: Swift *v.* Crow, 17 Ga. 609; Dart *v.* Southwestern B. & L. Assoc., 99 Ga. 794, 27 S. E. 171; Ripley *v.* Eady, 106 Ga. 422, 32 S. E. 343.

Montana: O'Keefe *v.* Dyer, 20 Mont. 477, 52 Pac. 196.

North Carolina: Disoway *v.* Edwards, 134 N. C. 254, 46 S. E. 501.

Oklahoma: Kelley *v.* Seay, 3 Okla. 527, 41 Pac. 615.

Pennsylvania: Curry *v.* Larer, 7 Pa. 470, 49 Am. Dec. 486.

Utah: McIntosh *v.* Johnson, 8 Utah, 359, 31 Pac. 450.

Vermont: Smith *v.* Wainwright, 24 Vt. 97.

Washington: Aberdeen *v.* Honey, 8 Wash. 251, 35 Pac. 1097.

[20] *United States:* Blewett *v.* Front St. C. R. R., 51 Fed. 625, 7 U. S. App. 285, 2 C. C. A. 415.

New York: Gerard *v.* Cowperthwait, 2 Misc. 371, 21 N. Y. Supp. 1092, 50 N. Y. St. R. 492.

North Carolina: Bazemore *v.* Bynum, 127 N. C. 11, 37 S. E. 67.

[21] Fleming *v.* Tolee, 7 Gratt. 310. This is usually held to be the case in bonds given to the government or to a city to perform some obligation, the value of which is uncertain. The sum named is to be recovered. *Ante*, § 416*a*.

United States: United States *v.* Hatch, 1 Paine, 336; U. S. *v.* Alcorn, 145 Fed. 995.

But though the penal sum named is to be treated as a penalty, yet the amount to be recovered in the old action of debt was measured by it; and if the plaintiff proceeds as at common law for debt on the bond as is still the case in some States the judgment should be for the entire penal sum.[22] And this is true although the condition is for the performance of several things, such as a payment of instalments, or the payment of interest from time to time and finally of the principal; the whole bond is forfeited by the first breach, and in such jurisdictions judgment must be entered for the entire penal sum,[23] and stands as security for the future acts of performance.[24] The recovery of this penal sum is in form like the recovery of any debt; and the amount of it must be found by the jury.[25]

But while the penal sum may be in form the amount due and to be recovered, the real finding upon which execution issues is universally the actual damage caused by breach of the condition.[26] This amount must be proved by the plain-

Kentucky: American Book Co. *v.* Wells, 83 S. W. 622, 26 Ky. L. Rep. 1159 (to sell school books at lowest rates).

New Jersey: Camden *v.* Greenwald, 65 N. J. L. 458, 47 Atl. 458 (street paving contract). But the penal sum in a bond for the return of merchandise imported being twice the estimated value of the merchandise, is a penalty. Dieckerhoff *v.* United States, 136 Fed. 545, 69 C. C. A. 255. See *ante*, § 416*a*. If the condition of the bond is without meaning it becomes a bond single and the defendant is responsible for the whole amount. Swain *v.* Graves, 8 Cal. 549.

[22] *United States:* Hagood *v.* Blythe, 37 Fed. 249.

Alabama: Moore *v.* Harton, 1 Port. 15.

Illinois: Toles *v.* Cole, 11 Ill. 562.

Maine: Gardner *v.* Niles, 16 Me. 279.

Massachusetts: Leighton *v.* Brown, 98 Mass. 515.

New York: Western Bank *v.* Sherwood, 29 Barb. 383 (but see Howard *v.* Farley, 18 Abb. Pr. 260, 3 Robert. 308). On a bond to two jointly the recovery must be joint.

Illinois: Burns *v.* Follansbee, 20 Ill. App. 41.

Kentucky: Sims *v.* Harris, 8 B. Mon. 55.

[23] *District of Columbia:* Davidson *v.* Brown, 1 Cranch C. C. 250; Nailor *v.* Kearney, 1 Cranch C. C. 112.

Georgia: Stephens *v.* Crawford, 3 Ga. 499.

Minnesota: Allan *v.* Everoth, 111 Minn. 395, 127 N. W. 426.

New Jersey: Rosenkrantz *v.* Durling, 5 Dutch. 191.

[24] *United States:* Whitmore *v.* Rice, 1 Biss. 237.

Massachusetts: Battey *v.* Holbrook, 11 Gray (Mass.), 212, 71 Am. Dec. 707.

New Jersey: Rosenkrantz *v.* Durling, 5 Dutch. 191.

New York: Brown *v.* Hallett, 1 Caines, 517.

[25] Hinckley *v.* West, 9 Ill. 136.

[26] *United States:* Whitmore *v.* Rice, 1 Biss. 237; Adler *v.* Newcomb, 2 Dill. 45; Hagood *v.* Blythe, 37 Fed. 249;

tiff [27] and found by the jury; [28] and if no actual damages are proved, only a nominal recovery is allowed.[29] If further breaches occur, damages will be allowed and execution will issue for those also.[30] This actual damage for which execution issues is the real judgment, on which action may be brought in another State, and not the nominal judgment for the penal sum.[31]

§ 677. Damages in excess of penalty.

* The question has been much agitated as to damages in gross, and also as to interest, and both as against a principal and against a surety.** It is fully settled, however, that in an action on a bond no damages in gross can be recovered, against either principal or surety, beyond the penalty.[32] Thus where a

Union G. & T. Co. *v.* Robinson, 79 Fed. 420, 24 C. C. A. 650.

Illinois: Wales *v.* Bogue, 31 Ill. 464.

Maine: Gardner *v.* Niles, 16 Me. 279.

Massachusetts: Leighton *v.* Brown, 98 Mass. 515.

New York: Van Wyck *v.* Montrose, 12 Johns. 350.

Ohio: Cairnes *v.* Knight, 17 Oh. St. 68.

South Carolina: Miller *v.* Nichols, 1 Bail. 226.

Tennessee: Williams *v.* Patterson, 2 Overt. 229.

All the damage suffered to the time of trial will be included. Gardner *v.* Niles, 16 Me. 279. And all damages caused by all breaches up to that time must be recovered in the original action. State *v.* Scoggin, 10 Ark. 326.

[27] Caverly *v.* Nichols, 4 Johns. (N. Y.) 189.

[28] *New Jersey:* Richman *v.* Richman, 10 N. J. L. 114.

New York: Van Benthuyson *v.* De Witt, 4 Johns. 213, 4 Am. Dec. 262.

Or a court of equity may assess the damages, where it has control of the action. Russell *v.* Farley, 105 U. S. 103, 26 L. ed. 1060.

[29] *Iowa:* Linder *v.* Lake, 6 Ia. 164.

Missouri: Middleton *v.* Moore, 36 Mo. App. 627.

North Carolina: Creech *v.* Creech, 98 N. C. 155, 3 S. E. 814.

South Carolina: Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385.

[30] *Illinois:* People *v.* Compher, 14 Ill. 447.

Maryland: Young *v.* Reynolds, 4 Md. 375; Ahl *v.* Ahl, 60 Md. 207.

Massachusetts: Waldo *v.* Fobes, 1 Mass. 10.

New York: Munroe *v.* Allaire, 2 Cai. 320; Rogers *v.* Coleman, 3 Cow. 62.

[31] Merrill *v.* McIntyre, 13 Gray (Mass.), 157.

[32] *United States:* Leggett *v.* Humphreys, 21 How. 66, 16 L. ed. 50; Bank of U. S. *v.* Magill, 1 Paine, 661; Lawrence *v.* U. S., 2 M'Lean, 581; Terry *v.* Robbins, 122 Fed. 725; U. S. *v.* Walker, 128 Fed. 1012; U. S. *v.* Lewis Pub. Co., 160 Fed. 989.

Illinois: Freeman *v.* The People, 54 Ill. 153.

Indiana: King *v.* Brewer, 19 Ind. 267; Gracter *v.* De Wolf, 112 Ind. 1, 13 N. E. 111.

Iowa: Sweem *v.* Steele, 10 Ia. 374; Sweem *v.* Steele, 5 Ia. 352.

Michigan: Spencer *v.* Perry, 18 Mich.

railroad company executed a bond to nine persons, according to their relative and respective several interests, in the penal sum of $3,000, as follows: "On this express condition that the said railroad company shall, on the assessment of damages to be made to secure right of way for said railroad, pay the obligees relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void," which was a several instrument, on which each obligee might sue, it was held that no one could recover more than his *pro rata* share of the penalty. If the damages assessed in favor of all exceeded the penalty, each obligee could recover only his share of it.[33]

The rule, it should be observed, does not apply to costs; the full judgment, including costs, may, therefore, be in excess of the penalty.[34]

§ 678. Interest on penalty.

But there has been more doubt on the question of recovery of interest on the penalty. At one time the American rule to be deduced from all the cases seemed to be, that against a surety in *debt on bond*, nothing could be recovered beyond the penalty;[35] that against the principal in that form of action, in-

394; Fraser *v.* Little, 13 Mich. 195, 87 Am. Dec. 741.

Missouri: Farrar *v.* Christy, 24 Mo. 453; State *v.* Sandusky, 46 Mo. 377.

New York: Culver *v.* Green, 4 Hill (N. Y.), 570.

North Carolina: New Home S. M. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805; Hughes *v.* Pritchard, 129 N. C. 42, 39 S. E. 632.

Pennsylvania: New Holland T. Co. *v.* Lancaster County, 71 Pa. 442.

South Carolina: Hale *v.* Hall, 2 Brev. 316.

Texas: Grand Lodge A. O. U. W. *v.* Cleghorn, 20 Tex. Civ. App. 134, 48 S. W. 750.

Wisconsin: Chase *v.* Dearborn, 23 Wis. 143 (triple damages not recoverable on bond).

Canada: Black *v.* Queen, 29 Can. 693.

[33] St. Louis, A. & R. I. R. R. *v.* Coultas, 33 Ill. 188.

[34] Dwyer *v.* United States, 93 Fed. 616.

[35] *United States:* United States *v.* Arnold, 1 Gall. 348, 360; s. c. 9 Cranch, 194; Bank of United States *v.* Magill, Paine, 661.

Kansas: Simmons *v.* Garrett, McC. 82.

Massachusetts: Harris *v.* Clap, 1 Mass. 308, 2 Am. Dec. 21; Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 75.

New Jersey: Tunison *v.* Cramer, 5 N. J. L. 498.

New York: Smedes *v.* Hooghtaling, 3 Caines, 48, 2 Am. Dec. 247; Fairlie *v.* Lawson, 5 Cowen, 424; Clark *v.* Bush, 3 Cowen, 151; Cook *v.* Tousey, 3 Wend. 444; Rayner *v.* Clark, 7 Barb. 581.

Pennsylvania: Graham *v.* Bickham, 4 Dall. 149, s. c. 2 Yeates, 32; Balsley *v.* Hoffman, 13 Pa. 203.

South Carolina: Stroble *v.* Large, 3

terest might perhaps be recovered beyond the penalty; while in England the penalty in all cases, except perhaps in equity, was the absolute limit.[36]

The later authorities, however, take an entirely different view; the better opinion now is, that interest may be recovered, in addition to the penalty, in an action whether against the principal[37]

McCord, 112 (see, however, Roulain *v.* McDowall, 1 Bay, 490); Smith *v.* Macon, 1 Hill Eq. 339; Bonsall *v.* Taylor, 1 McC. 503; Smith *v.* Vanderhorst, 1 McC. 328, 10 Am. Dec. 674; Winslow *v.* Ancrum, 1 McC. Eq. 100; Richardson *v.* Richardson, McMull Eq. 103.

Virginia: Payne *v.* Ellzey, 2 Wash. 143.

In United States *v.* Arnold, 1 Gall. 348, 360, Story, J., said: "Notwithstanding some contrariety in the books, I think the true principle, supported by the better authorities, is that the court cannot go beyond the penalty and interest thereon, from the time it becomes due by the breach."

[36] Lowe *v.* Peers, 4 Burr. 2225, which was covenant on a sealed contract not to marry; Winter *v.* Trimmer, 1 W. Bl. 395; Bird *v.* Randall, 1 W. Bl. 373, 387; 3 Burr. 1345; Brangwin *v.* Perrot, 2 W. Bl. 1190, on an indemnity bond against the maintenance of a bastard; Knight *v.* Maclean, 3 Br. Ch. 496; Tew *v.* Earl of Winterton, 3 Br. Ch. 490; White *v.* Sealy, Doug. 49, on a bond conditioned for the payment of rent; Londsale *v.* Church, 2 T. R. 388, overruled by Wilde *v.* Clarkson, 6 T. R. 303; and M'Clure *v.* Dunkin, 1 East, 436; Harrison *v.* Wright, 13 East, 343; Hefford *v.* Alger, 1 Taunt. 218; Evans *v.* Brander, 2 H. B. 547; Paul *v.* Goodluck, 2 Bing. N. C. 220; Hellen *v.* Ardley, 3 C. & P. 12; Grosvernor *v.* Cook, 1 Dick. 208; Macworth *v.* Thomas, 5 Ves. 329; Clarke *v.* Sexton, 6 Ves. 411.

In a case in the Queen's Bench it was said, that a replevin bond is no exception to the general rule, that on a bond the plaintiff cannot recover beyond the penalty and costs of suit. Branscombe *v.* Scarborough, 6 Q. B. 13. For the present English law see Heynes *v.* Dixon [1900], 2 Ch. 561.

[37] *United States:* Ives *v.* Merchants' Bank, 12 How. 159, 13 L. ed. 936; U. S. *v.* Arnold, 1 Gall. 348.

Alabama: Tyson *v.* Sanderson, 45 Ala. 364; Borden *v.* Bradshaw, 68 Ala. 362.

Colorado: Crane *v.* Andrews, 10 Colo. 265.

Connecticut: Carter *v.* Carter, 4 Day, 30, 4 Am. Dec. 177; Lewis *v.* Dwight, 10 Conn. 95; Washington County Ins. Co. *v.* Colton, 26 Conn. 42.

Georgia: Moss *v.* Wood, R. M. Charlt. 42; Frink *v.* Southern Exp. Co., 82 Ga. 33.

Illinois: Holmes *v.* Standard Oil Co., 183 Ill. 70, 55 N. E. 647, 82 Ill. App. 476.

Iowa: Getchell & M. L. & M. Co. *v.* Peterson, 124 Ia. 599, 100 N. W. 550.

Kansas: Bunchfield *v.* Haffey, 34 Kan. 42, 7 Pac. 548.

Kentucky: Carter *v.* Thorn, 18 B. Mon. 613; Highes *v.* Wickcliffe, 11 B. Mon. 202.

Massachusetts: Pitts *v.* Tilden, 2 Mass. 118; Warner *v.* Thurlo, 15 Mass. 154; Bank of Brighton *v.* Smith, 12 All. 243, 90 Am. Dec. 144; Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604.

New Jersey: Robbins *v.* Long, 16 N. J. Eq. 59; Gloucester *v.* Eschbach, 54 N. J. L. 150, 23 Atl. 360.

New York: Brainard *v.* Jones, 18 N. Y. 35; Ringle *v.* O'Matthiessen, 39 N. Y. Supp. 92.

or the surety.[38] In Lyon *v.* Clark,[39] it is pointed out, in the very clear opinion of Comstock, J., that there is a distinction between the question whether, at the time of the default, the liability can exceed the penalty, and the question whether, after default, interest can be allowed in excess of the penalty. The first is a question of the effect of the contract; the second is one of compensation for a breach of the contract. This distinction appears to be perfectly sound, and upon the whole there seems no reason why interest on the penalty should not be allowed. In a few States, however, the recovery is still limited to the penalty without interest.[40] In New York, by

Pennsylvania: Perit *v.* Wallis, 2 Dall. 252; Boyd *v.* Boyd, 1 Watts, 365.

Rhode Island: Walcott *v.* Harris, 1 R. I. 404.

Texas: Austin *v.* Townes, 10 Tex. 24.

Virginia: Tennant *v.* Gray, 5 Munf. 494; Baker *v.* Morris, 10 Leigh, 284; Bailey *v.* James, 11 Gratt. 468, 62 Am. Dec. 659; Tazewell *v.* Saunders, 13 Gratt. 354.

Washington: Spokane & Idaho Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672 (where the recovery in excess of the penal sum is due to including interest in the actual damages).

West Virginia: Perry *v.* Horn, 22 W. Va. 381.

Wisconsin: Clark *v.* Wilkinson, 59 Wis. 543, 18 N. W. 481; Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

Canada: Beam *v.* Beatty, 3 Ont. L. R. 345.

The rate of interest is fixed by the law of the place where the bond is payable. Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691.

[38] *Arkansas:* James *v.* State, 65 Ark. 415, 46 S. W. 937 (from time of breach).

Colorado: Crane *v.* Andrews, 10 Colo. 265.

Kansas: Burchfield *v.* Haffey, 34 Kan. 42.

Maine: Wyman *v.* Robinson, 73 Me. 384, 40 Am. Rep. 560.

Maryland: State *v.* Wayman, 2 G. & J. 254.

Mississippi: Maryland *v.* Winter, 43 Miss. 666 (from time of breach).

New York: Lyon *v.* Clark, 8 N. Y. 148; Brainard *v.* Jones, 18 N. Y. 35; Hood *v.* Hayward, 124 N. Y. 12, 26 N. E. 331; Furber *v.* McCarthy, 12 N. Y. Supp. 794; Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929, 34 N. Y. St. R. 138 (from time of breach).

Oregon: Carlon *v.* Dixon, 14 Ore. 293, 12 Pac. 394 (from time of breach).

Pennsylvania: Pennsylvania Co. *v.* Swain, 189 Pa. 626, 42 Atl. 297, 69 Am. St. Rep. 830 (from time of demand); Folz *v.* Tradesmen's T. & S. F. Co., 201 Pa. 583, 51 Atl. 379 (from time of demand); New York L. Ins. Co. *v.* Seckel, 8 Phila. 92 (from time of breach).

[39] 8 N. Y. 148.

[40] *Michigan:* Fraser *v.* Little, 13 Mich. 195; White S. M. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; People's Savings Bank *v.* Campau, 124 Mich. 106, 82 N. W. 803.

Mississippi: Rubon *v.* Stephan, 25 Miss. 253.

Missouri: State *v.* Sandusky, 46 Mo. 377; Showles *v.* Freeman, 81 Mo. 540; Turner *v.* Lord, 92 Mo. 113.

North Carolina: State *v.* Estes, 101 N. C. 541.

South Carolina: Murray *v.* Aiken

statute, interest may be recovered on a bond for the payment of money, but not on a bond for the performance of an act.[41]

§ 679. Bonds containing express covenants.

In certain bonds, the party affirmatively stipulating to do or to refrain from doing some particular act, proceeds to secure his agreement by a penalty, and in such cases the plaintiff at common law had his election whether to sue in debt or in covenant. There is a clear distinction between such a bond and the common bond, which merely stipulates for the payment of a sum of money, and makes its payment depend on a condition; for the performance of that condition there is no promise, unless one can be implied from the joint effect of the condition and penalty.

Where a common-law action of covenant could be brought upon a bond, the measure of damages would be compensation, irrespective of the penalty, and even beyond it.[42] "There is a difference between covenants in general and covenants *secured* by a penalty or forfeiture. In the latter case, the obligee has his election; he may either bring an action of debt and recover the penalty, after which recovery of the penalty he cannot resort to the covenant; or, if he does not choose to go for the penalty, he can proceed upon the covenant, and recover more or less than the penalty, *toties quoties*." [43] The same principle was laid down in Pennsylvania,[44] where the defendant had agreed to pay $22,318.49 for certain stock, and bound himself for the performance of the agreement in the sum of $1,000; here it was held that this was not stipulated damages, but a penalty merely: and the plaintiff recovered damages beyond

Min. etc. Co., 39 S. C. 457, 18 S. E. 5 (*semble*).

Tennessee: Cherry *v.* Mann, Cooke 268; State *v.* Blakemore, 7 Heisk. 638.

[41] Brainard *v.* Jones, 18 N. Y. 35; Polhemus Printing Co. *v.* Hallenbeck, 46 App. Div. 563, 61 N. Y. Supp. 1056; Sachs *v.* America Surety Co., 72 App. Div. 60, 76 N. Y. Supp. 335, affirmed 177 N. Y. 551, 69 N. E. 1130.

[42] Martin *v.* Taylor, 1 Wash. C. C. 1. So L. C. J. Tenterden, in his treatise on Shipping, assumes that as to charter-parties, damages may be recovered beyond the amount of the penalty and costs. Abbott on Shipping, part iv, ch. ii, of the shipowner's lien for profits, etc.

[43] Lord Mansfield in Lowe *v.* Peers, 4 Burr. 2225. See, also, Bird *v.* Randall, 1 W. Bl. 373, 387; Winter *v.* Trimmer, 1 W. Bl. 395; Harrison *v.* Wright, 13 East, 343.

[44] Graham *v.* Bickham, 4 Dall. 149.

the penalty. "The plaintiff," said the court, "is entitled, notwithstanding the penalty, to recover damages commensurate with the injury suffered by a non-performance." So again in New York, in a case on a building agreement,[45] it was said: "As the articles contained a penalty and an express covenant by the defendant to pay the instalment for which the action was brought, the plaintiffs could, at their election, sue for either." [46]

But the question still remains: * does an ordinary bond imply an agreement to do the thing, on condition of the performance of which the penalty is to become void; and can an action of covenant be brought on it? This is an embarrassing and vexed question. Mr. Chitty says: [47] "It seems that covenant lies on a bond, for it proves an agreement." It is doubtful what is the purport of this language. A bond undoubtedly proves an agreement; but is the agreement proved, the one stated in the penalty—to pay the money for which the obligee declares himself bound—or in the condition? [48] The matter is of importance, and it seems impossible, on any just construction of the instrument, to imply from the condition an absolute agreement. This is not the proper place for a more elaborate discussion of the matter, but it could not with propriety be altogether overlooked.** In New York the Supreme Court has clearly intimated an opinion that an action of covenant will lie on a bond to enforce the condition; [49] and in Beale *v.* Hayes[50] Duer, J., used the following language:

[45] Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

[46] *Acc.*, Noyes *v.* Phillips, 60 N. Y. 408; Richards *v.* Edick, 17 Barb. 260.

[47] Chitty on Pleading, vol. i, p. 132.

[48] Mr. Chitty cites several cases: Hill *v.* Carr, 1 Ch. Cas. 294; Holles *v.* Carr, 3 Swanst. 649, which is in fact the same; Norrice's Case, Hardr. 178, and Com. Dig. Covenant, A. 2. The two first cases (in fact one) contain the *obiter dictum*, that "*covenant lies upon a bond.*" The third was covenant on a covenant proper, the word *oblige* only being used instead of the usual phrase; and Lord C. B. Comyns, with his usual precision, says: "Covenant lies, *if an agreement appear*, in an obligation." This is unquestionably true—"*if the agreement appear.*" But in the condition of a bond to do or refrain from doing any particular act secured by a given penalty, does any agreement appear, absolutely to do the act or to respond in indefinite damages? Practically, we well know that it is not so understood; the obligor always considers the penalty as limiting the extent of his obligation.

[49] Clark *v.* Bush, 3 Cowen, 151. In

[50] 5 Sandf. 640.

"As all distinctions resulting merely from the form of the action, are now abolished, it appears to be a necessary consequence that, as a general rule, every action for the breach of an executory contract, whether the agreement contains a penalty or not, must be considered as an action for damages, in which the amount of the recovery will be limited only by the proof, and by the sum for which judgment is demanded in the complaint. The only exception will be, when, from the nature of the contract and the terms in which it is expressed, damages, as liquidated by the parties, may be justly treated, not as a penalty, but as a contingent debt, for this is a distinction in law which the Code has not abolished nor affected. It is true, that upon this construction, the insertion of a penalty in an agreement is a useless form, but this is no alteration of the law, since, for more than a century past, such has been its real character."

Notwithstanding these remarks, the practice of recovering damages beyond the penalty of a money bond is unknown, a condition of things which could hardly exist if covenant would lie on such an agreement.

§ 679a. Compensation for breach of condition.

For breach of condition of a bond the plaintiff must prove that he suffered loss; and if no actual damages are proved, nominal damages only can be recovered.[51] On a bond to secure

Martin *v.* Taylor (1 Wash. C. C. 1), in an action of covenant on an agreement secured by a penalty, Washington, J., said, that, "where there is a penalty in an agreement under seal, the party injured may at common law sue for the whole penalty, and must be satisfied with it; or he may bring covenant, and recover in damages more or less than the penalty." It is to be remarked here that the agreement contained an express covenant to do the act for the non-performance of which the action was brought. The case, therefore, decides nothing as to the main point, whether covenant can be brought on a bond upon an agreement contained in the condition, and whether in such suit damages can be assessed beyond the penalty.

[51] *Illinois:* Dent *v.* Davison, 52 Ill. 109 (to pay firm debts); Karr *v.* Peter, 60 Ill. App. 209 (to pay all bills contracted by defendant in building house).

Massachusetts: Pollard *v.* Porter, 3 Gray, 312, 63 Am. Dec. 741 (to foreclose mortgage and pay balance to mortgagor; instead of foreclosing defendant assigned mortgage, assignee foreclosed and sold, no balance realized).

Minnesota: Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535 (to erect house on defendant's own premises).

Missouri: Fidelity & D. Co. *v.* Colvin, 83 Mo. App. 204 (to erect building).

the payment of money or the delivery of property, the measure of damages is the value of the money or property at the time of performance; [52] to buy, the difference between the contract price and the market rate; [53] to give a good title, the value of the land; [54] to erect a building on land, the additional value it would give to the land, [55] or if the bond is given to a mortgagee of the land, the enhancement of the security; [56] and, in general, in any case, the loss caused to the plaintiff by failure to perform the condition.[57]

§ 679b. Contractors' bonds.

For breach of a bond given by a contractor for the perform-

[52] *Arizona:* Finley *v.* Tucson, 7 Ariz. 108, 60 Pac. 872 (to refund salary if held not entitled to office).

Connecticut: Babbet *v.* Belding, 1 Root, 445 (to return public securities on demand).

Mississippi: Lanier *v.* Trigg, 6 Sm. & M. 641, 45 Am. Dec. 293 (to pay in notes of particular bank).

North Carolina: Lackey *v.* Miller, 61 N. C. 26 (to pay in current bank bills).

South Carolina: McKeegan *v.* McSwiney, 2 S. C. 191 (to pay in Confederate money). In North Carolina the measure of recovery on an obligation payable in Confederate money was the value of the consideration. McRae *v.* McNair, 69 N. C. 12. See *ante*, § 278.

[53] *Georgia:* Ripley *v.* Eady, 106 Ga. 422, 32 S. E. 343.

Ontario: Beam *v.* Beatty, 3 Ont. L. R. 345.

Where the goods were to be manufactured (labels to be printed) the cost of a specially constructed machine (special plate) is recoverable in a case where loss of profits is not shown. Crocker *v.* Field's B. & C. Co., 93 Cal. 532, 29 Pac. 225.

[54] Bryant *v.* Hambrick, 9 Ga. 133. In States where the consideration only is recoverable for breach of covenant of title, that limits recovery here. Stewart *v.* Noble, 1 G. Greene (Ia.), 26. See *post*, § 959 *et seq.*

[55] *Missouri:* United R. E. Co. *v.* McDonald, 140 Mo. 605, 41 S. W. 913.

Pennsylvania: German-American Title & Trust Co. *v.* Citizens' Trust & Surety Co., 190 Pa. 247, 42 Atl. 682.

[56] *Minnesota:* Longfellow *v.* McGregor, 61 Minn. 494, 63 N. W. 1032.

New York: Sachs *v.* American Surety Co., 72 App. Div. 60, 76 N. Y. Supp. 335.

[57] *Arkansas:* Sullivant *v.* Reardon, 5 Ark. 140, 39 Am. Dec. 368 (to clear land: cost of clearing).

Massachusetts: Brookfield *v.* Reed, 152 Mass. 568, 26 N. E. 138 (to repair a highway: cost of completing repairs, and evidence of expenses incurred after action commenced could be received).

Michigan: Wheeler *v.* Meyer, 95 Mich. 36, 54 N. W. 689 (to sell goods for plaintiff's benefit; amount realized from goods actually sold, and value at time of demand of goods unsold); Bell *v.* Paul, 35 Neb. 240, 52 N. W. 1110 (to turn over buildings free from liens: amount of unpaid liens, not of unpaid debts on which liens might be filed); Scott *v.* Phillips, 140 Pa. 51, 21 Atl. 241 (to pay premiums on insurance policy; amount of the premiums).

ance of the work called for in the contract, the measure of damages is the same as in an action for breach of the contract itself,[58] including all damages that have accrued even after bringing the suit.[59] There is no liability on the bond for defaults of a sub-contractor.[60]

Materialmen are entitled to recover on bonds given for their benefit.[61]

§ 680. Statutory bonds and undertakings.

In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from an attachment, injunction, or other provisional remedy wrongfully issued or applied, the measure of damages is substantially indicated by the terms of the instrument as authorized by the statute. The cases turn chiefly on the interpretation of particular words, and the construction of particular statutes; and the ordinary rules for measuring damages yield to the construction of the statute under which the bond is given.[62] Usually exemplary damages are not allowed; [63] and in all actions upon statutory bonds remote or uncertain damages are excluded,[64] and the penalty fixed in the bond is the absolute limit of the damages, except that, as shown above, the plaintiff might, in a proper case recover interest.[65] These considerations, of course,

[58] *United States:* Mercantile Trust Co. *v.* Hensey, 205 U. S. 298, 51 L. ed. 811, 27 Sup. Ct. 535, affirming 27 App. D. C. 210; Clark *v.* Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. 878.

Indiana: Donaldson *v.* State (Ind. App.), 90 N. E. 132.

Minnesota: Allen *v.* Encroth, 111 Minn. 395, 127 N. W. 426.

Vermont: Spear *v.* Stacy, 26 Vt. 61.

In Chambers *v.* Ft. Bend County, 14 Tex. 34, the actual damages were not allowed, on the ground that they were unconscionable. *Ante*, § 606c.

[59] *Minnesota:* Allen *v.* Encroth, 111 Minn. 395, 127 N. W. 426.

Vermont: Spear *v.* Stacy, 26 Vt. 91.

[60] State *v.* Hinsdale-Doyle Granite Co., 117 Ind. 476, 20 N. E. 437.

[61] *District of Columbia:* U. S. *v.* Burgdorf, 13 D. C. App. 506.

Indiana: United States F. & G. Co. *v.* American Blower Co., 41 Ind. App. 620, 84 N. E. 555.

[62] *Minnesota:* Grams *v.* Murphy, 103 Minn. 219, 114 N. W. 753.

South Dakota: Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150.

[63] Cobb *v.* People, 84 Ill. 511 (liquor dealer's bond).

[64] *Alabama:* Higgins *v.* Mansfield, 62 Ala. 267; Drake *v.* Webb, 63 Ala. 596.

Illinois: Silsbe *v.* Lucas, 53 Ill. 479.

New York: Bennett *v.* Brown, 20 N. Y. 99.

Vermont: Campbell *v.* Tarbell, 55 Vt. 455.

[65] *Alabama:* Windham *v.* Coats, 8 Ala. 285; Seamans *v.* White, 8 Ala. 656.

relate to actions on the bond; the measure of damages in actions of which the gist is the misuse of legal process, or trespass to the person, actions to which resort may often be had in addition to the remedy by debt on bond, is determined by wholly different considerations.[66]

A bond given under a statute must conform strictly to the statutory requirements; but if by reason of failing to do so it is void as a statutory bond, it may nevertheless be valid as a common-law bond. In that case the measure of damages upon it will be regulated by the principles of the common law.[67]

§ 681. Reduction of damages.

In conformity with the general principle of indemnity, the rules of reduction applicable to trover and other classes of action, are recognized here. Thus where a plaintiff in the original action in which he had obtained an attachment, had been nonsuited, he was permitted to show in reduction of damages in the action on the attachment bond, that the property thus attached had been reattached in a subsequent action by him, which had been prosecuted to a judgment, under which the property was sold.[68] Had the original taking been *mala fide*, however, without color of legal right, it may be inferred, from the opinion of the court, that this would not have been allowed. But in Oregon the same decision has been reached where the first attachment was not made in good faith.[69] So, again, where the statute provided that in actions to determine claims to real property, the plaintiff must recover on the strength of his own title, it was held in an action on a bond given upon the granting of an injunction to restrain a plaintiff from cutting timber on a

Iowa: Perry *v.* Denson, 1 Gr. 467.

Maryland: Levy *v.* Taylor, 24 Md. 282.

Mississippi: Rubon *v.* Stephan, 25 Miss. 253.

New York: Roberts *v.* White, 73 N. Y. 375.

Vermont: Sturges *v.* Knapp, 36 Vt. 439.

[66] *Kentucky:* Pettit *v.* Mercer, 8 B. Mon. 51.

Missouri: State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580.

[67] *United States:* Dixon *v.* U. S., 1 Brock. 177.

Illinois: Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189, 67 Ill. App. 659.

New Hampshire: Claggett *v.* Richards, 45 N. H. 360.

[68] Earl *v.* Spooner, 3 Den. (N. Y.) 246.

[69] Morrison *v.* Crawford, 7 Ore. 472.

tract of land, that the defendant might show in reduction that the plaintiff had no title to the land and no right to cut timber on it.[70] In short, in a proper case the defendant, in order to reduce the damages, may show any admissible facts to prove the damages less than they would at first seem,[71] as that the consequences should have been avoided.[72] A set-off may be allowed in a proper case.[73]

§ 681a. Actions against sureties.

The liability of the sureties on a bond is to be construed strictly, and is limited by the actual language of the bond,[74] though the natural meaning of the language will be followed.[75] Therefore, in the absence of provisions in the bond which would lead to an opposite result, the sureties are not liable for defaults preceding the execution and delivery of the bond;[76] nor can they be called upon to contribute to losses for which the liability lies primarily on the parties to other bonds.[77] If the parties on two bonds are jointly liable, the sureties on both

[70] Jenkins *v.* Parkhill, 25 Ind. 473; but see Waterman *v.* Frank, 21 Mo. 108 (suit on delivery bond; defendant cannot show title in himself).

[71] *Maryland:* Rawlings *v.* Adams, 7 Md. 26 (bond for deed; title had come to heir of plaintiff and plaintiff's equitable title would defeat ejectment).

Massachusetts: Merrill *v.* McIntire, 13 Gray, 157 (bond to pay money; may show payment, though not set up in the answer).

Missouri: Wagner *v.* Dette, 2 Mo. App. 254 (to keep property clear of liens; payment by plaintiff to discharge lien reduced amount he must pay for building house).

[72] Niagara F. P. Co. *v.* Lee, 20 App. Div. 217, 47 N. Y. Supp. 1.

[73] Van Etten *v.* Kosters, 48 Neb. 152, 66 N. W. 1106.

[74] *California:* Ogden *v.* Davis, 116 Cal. 32, 47 Pac. 772.

Illinois: People *v.* Moon, 4 Ill. 123.

Maryland: Fullerton *v.* Miller, 22 Md. 1.

New York: Sutorius *v.* Dunstan, 59 N. Y. Super. Ct. 166, 13 N. Y. Supp. 601.

Ohio: Smith *v.* Huesman, 30 Oh. St. 662.

Therefore they are not liable for any act of the principal not covered by the bond.

United States: Johnston *v.* Sexton, 159 Fed. 70, 86 C. C. A. 260.

California: Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

[75] Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630.

[76] *United States:* Meyers *v.* U. S., 1 McLean, 493.

Illinois: Bartlett *v.* Wheeler, 195 Ill. 445, 63 N. E. 169.

New Jersey: Jeffers *v.* Johnson, 18 N. J. L. 382.

Texas: Wandelohr *v.* Grayson County Nat. Bank (Tex. Civ. App.), 106 S. W. 413.

[77] *New York:* Barnes *v.* Cushing, 43 App. Div. 158, 59 N. Y. Supp. 345.

Tennessee: Moore *v.* Lassiter, 16 Lea, 630.

bonds contribute to the loss.[78] Sureties cannot be held liable in exemplary damages, even when such damages may be recovered against the principal.[79]

The sureties being privies to an action against their principal, they are bound by a judgment against him with regard both to the fact of liability and to the amount of damages;[80] and they are also bound, as to amount of damages, by his admissions,[81] and by the recitals of the bond.[82]

[78] *Iowa:* State *v.* McGlothlin, 61 Iowa, 312, 16 N. W. 137.

North Carolina: Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627.

Ohio: Swisher *v.* McWhinney, 64 Oh. St. 343, 60 N. E. 565.

Oregon: Thompson *v.* Dekum, 32 Ore. 506, 52 Pac. 517, 755.

[79] *Kentucky:* Johnson *v.* Williams, 111 Ky. 289, 63 S. W. 759; Growbarger *v.* United States F. & G. Co., 126 Ky. 118, 102 S. W. 873, 31 Ky. L. R. 555, 11 L. R. A. (N. S.) 758.

Minnesota: North *v.* Johnson, 58 Minn. 242, 59 N. W. 1012.

Oklahoma: Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

[80] *Illinois:* McAllister *v.* Clark, 86 Ill. 236.

Iowa: Mason *v.* Richards, 12 Ia. 73; Krepper *v.* Glenn, 73 Ia. 730, 36 N. W. 763.

Kansas: Kennedy *v.* Brown, 21 Kan. 171; First State Bank *v.* Martin, 81 Kan. 794, 106 Pac. 1056; O'Loughlin *v.* Carr, 9 Kan. App. 818, 60 Pac. 478.

Kentucky: Hobbs *v.* Middleton, 1 J. J. Marsh. 176.

Massachusetts: McKim *v.* Haley, 173 Mass. 112, 53 N. E. 152.

Michigan: People *v.* Laning, 73 Mich. 284, 41 N. W. 424.

Minnesota: Jacobson *v.* Anderson, 72 Minn. 426, 75 N. W. 607.

Missouri: State *v.* Berning, 74 Mo. 87, 41 Am. Rep. 305; Wolff *v.* Schaefer, 74 Mo. 154.

Montana: Botkin *v.* Kleinschmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641.

New York: Methodist Church *v.* Barker, 18 N. Y. 363; Douglass *v.* Ferris, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; Poillon *v.* Volkenning, 11 Hun, 385 (finding of referee and judgment on it).

Ohio: Braiden *v.* Mercer, 44 Oh. St. 339, 7 N. E. 155; Slagle *v.* Entrekin, 44 Oh. St. 637, 10 N. E. 675.

Oregon: Drake *v.* Sworts, 24 Ore. 198, 33 Pac. 563; Thompson *v.* Dekum, 32 Ore. 506, 52 Pac. 517, 755.

Contra:

Maryland: Inglehart *v.* State, 2 Gill & J. 235 (only *prima facie* evidence against surety).

Massachusetts: Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80 (sureties may

[81] *Massachusetts:* Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417.

Tennessee: Young *v.* Hare, 11 Humph. 303.

So on a mechanic's lien bond the price fixed in the contract between the contractor (the principal) and a subcontractor will ordinarily measure the liability of the sureties. St. Paul Foundry Co. *v.* Wegmann, 40 Minn. 419, 42 N. W. 288.

[82] Capital Lumbering Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454, 7 Am. St. Rep. 792.

Questions of the discharge of sureties from liability because of particular circumstances, not presenting questions of the measure of damages, do not fall within the scope of this work and cannot be discussed at length.[83]

B.—Bonds Given in Judicial Proceedings

§ 682. Attachment bonds.

Where a party gives a bond before suing out an attachment on personal property, the direct loss of the owner is the loss of use of the property pending attachment proceedings; and the value of the use of the property may therefore be recovered in an action on the bond.[84] The owner may also recover compen-

set up statute of limitations though principal did not).

North Carolina: McKellar *v.* Powell, 4 Hawks, 34.

Tennessee: Atkins *v.* Baily, 9 Yerg. 111 (judgment confessed by principal on an official bond after he retired from office).

West Virginia: State *v.* Nutter, 44 W. Va. 385, 30 S. E. 67 (only evidence: *semble.* In this case the condition of the bond was to pay a judgment against the principal).

They are of course equally entitled to the benefit of a prior judgment in favor of their principal against the same plaintiff. Renkert *v.* Elliott, 11 Lea (Tenn.), 235.

[83] Sureties have been held discharged in the following cases:

Arkansas: Haden *v.* Swepston, 64 Ark. 477, 43 S. W. 393 (order of removal of principal afterward rescinded).

Louisiana: McMillen *v.* Gibson, 10 La. 517 (increase of obligation on the bond).

New York: People *v.* Jansen, 7 Johns. 332, 5 Am. Dec. 275 (laches).

Tennessee: Johnson *v.* Hacker, 8 Heisk. 388 (extension of time).

They have been held not discharged in the following cases:

Mississippi: Denio *v.* State, 60 Miss. 949 (change of principal's duties).

New York: People *v.* Russell, 4 Wend. 570 (laches); Horner *v.* Lyman, 2 Abb. App. 399, 4 Keyes, 237 (change of statute as to costs); Atlantic & P. T. Co. *v.* Barnes, 64 N. Y. 385, 21 Am. Rep. 621 (failure to give notice of principal's default).

Ohio: Hanna *v.* International Petroleum Co., 23 Oh. St. 622 (immaterial change in process); Dawson *v.* State, 38 Oh. St. 1 (change of principal's duties); McGaughey *v.* Jacoby, 54 Oh. St. 487, 44 N. E. 231 (fraud of principal in procuring signatures).

[84] *Arkansas:* Boatwright *v.* Stewart, 37 Ark. 614.

Iowa: Porter *v.* Knight, 63 Ia. 365, 19 N. W. 282.

Kentucky: Blakely *v.* Bogard, 136 S. W. 616.

Missouri: State *v.* McKeon, 25 Mo. App. 667.

Ohio: Bruce *v.* Coleman, 1 Handy, 515.

Texas: Munnerlyn *v.* Alexander, 38 Tex. 125.

So where money is garnished interest on the money during the period of detention may be recovered on the bond.

Alabama: Alabama S. L. Co. *v.* Reed, 99 Ala. 19, 13 So. 43.

sation for a depreciation in the value of the property, measured by the difference in the value of the property at the time of suing out the attachment and at the dissolution of it.[85] Where the property was sold, the measure of damages is the value of the property, not necessarily the amount for which it sold;[86] diminished, however, by the fact that the proceeds were paid over to the owner,[87] or went to discharge a debt legally due from him.[88] The value taken is the value of the property at the time of the attachment, not at the time of sale, together with

Georgia: Fourth Nat. Bank *v.* Mayer, 96 Ga. 728, 24 S. E. 453.

Illinois: Strong *v.* Hasterlik, 146 Ill. App. 346.

Kentucky: Vanatta *v.* Vanatta, 21 Ky. L. Rep. 1464, 55 S. W. 685.

Missouri: State *v.* Flarsheim, 13 Mo. App. 1, 119 S. W. 17.

New York: Northampton Nat. Bank *v.* Wylie, 52 Hun, 148, 4 N. Y. Supp. 907.

Where the goods did not belong to the plaintiff he could not recover damages for loss of use of the goods. Tebo *v.* Betancourt, 73 Miss. 868, 19 So. 833, 55 Am. St. Rep. 573.

Where the goods attached were a portion of a stock in trade, plaintiff could not recover for loss of use of the entire shop. Charles City Plow & M. Co. *v.* Jones, 71 Ia. 234, 32 N. W. 280.

[85] *Arkansas:* Boatwright *v.* Stewart, 37 Ark. 614.

California: Frankel *v.* Stern, 44 Cal. 168.

Ohio: Bruce *v.* Coleman, 1 Handy, 515.

Tennessee: Doll *v.* Cooper, 9 Lea, 576.

At least where the depreciation in value was caused by negligent keeping of the goods by the sheriff:

Alabama: Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350; Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136.

California: Witherspoon *v.* Cross, 135 Cal. 96, 67 Pac. 18.

Iowa: Blaul *v.* Tharp, 83 Ia. 665, 94 N. W. 1044; Ruthven *v.* Beckwith, 84 Ia. 715, 45 N. W. 1073, 51 N. W. 153.

But when the market price of stock fell while it was under attachment the court held that since it was not due to the attachment it was not recoverable on the bond. Miller *v.* Ferry, 50 Hun, 256, 2 N. Y. Supp. 863.

[86] *Alabama:* Hundley *v.* Chadwick, 109 Ala. 575, 19 So. 845.

Arkansas: Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740.

Indiana: Trentman *v.* Wiley, 85 Ind. 33.

Iowa: Porter *v.* Knight, 63 Ia. 365, 19 N. W. 282.

Mississippi: Woolner *v.* Spalding, 65 Miss. 204.

Missouri: State *v.* Gage, 52 Mo. App. 464; State *v.* Ryley, 76 Mo. App. 412.

North Carolina: Stein *v.* Cozart, 122 N. C. 280, 30 S. E. 340.

[87] *Arkansas:* Boatwright *v.* Stewart, 37 Ark. 614.

Indiana: Trentman *v.* Wiley, 85 Ind. 33.

[88] *Alabama:* Hamilton *v.* Maxwell, 119 Ala. 23, 34 So. 455 (applied on debt sued on by consent of debtor).

Arkansas: Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740 (debt on which attachment suit was brought).

Iowa: Ruthven *v.* Beckwith, 84 Ia. 715, 45 N. W. 1073 (debt on which attachment is brought); Schwarts *v.* Davis, 90 Ia. 324, 330, 57 N. W. 849, 48 Am. St. Rep. 446 (mortgage debt).

interest on the value.[89] Damages cannot be obtained, according to the prevailing doctrine, for loss of credit caused by the attachment of a stock of goods used in business;[90] but on the other hand the weight of authority allows the recovery of compensation for loss of business caused by such attachment.[91] Consequential damages may be recovered in a proper case. So where by the attachment a party is prevented from performing a contract, and material or property prepared or procured to enable him to do so is thus depreciated in its value to him,

In some jurisdictions as has been seen (*ante*, § 60), the amount applied in the suit in which the wrongful attachment was made, without consent of the debtor, cannot be deducted. Hundley *v.* Chadwick, 109 Ala. 575, 19 So. 845.

[89] *Missouri:* State *v.* Ryley, 76 Mo. App. 412.

Pennsylvania: Keeler *v.* Ricker, 3 Northampton Co. Rep. 48.

[90] *United States:* L. Bucki & Son L. Co. *v.* Fidelity & D. Co., 109 Fed. 393, 48 C. C. A. 436.

Arkansas: Holliday *v.* Cohen, 34 Ark. 707.

California: Heath *v.* Lent, 1 Cal. 410.

Illinois: Oberne *v.* Gaylord, 13 Ill. App. 30 (see MacVeagh *v.* Bailey, 29 Ill. App. 606).

Iowa: Campbell *v.* Chamberlain, 10 Ia. 337; Plumb *v.* Woodmansee, 34 Ia. 116; Lowenstein *v.* Monroe, 55 Ia. 82, 7 N. W. 406.

Kentucky: Mocerf *v.* Stirman, 16 Ky. L. Rep. 587, 29 S. W. 324; Pettit *v.* Mercer, 8 B. Mon. 51.

Mississippi: Marqueze *v.* Sontheimer, 59 Miss. 430.

Missouri: State *v.* Stark, 75 Mo. 566; State *v.* McHale, 16 Mo. App. 478; State *v.* Coombs, 67 Mo. App. 199.

Ohio: Alexander *v.* Jacoby, 23 Oh. St. 358.

Oregon: Drake *v.* Sworts, 24 Ore. 198, 33 Pac. 563, 41 Am. St. Rep. 854.

Texas: Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849.

Vermont: Weeks *v.* Prescott, 53 Vt. 57.

Washington: Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650.

Wisconsin: Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97.

In some jurisdictions, however, damages may be recovered for loss of credit.

Alabama: Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Flournoy *v.* Lyon, 70 Ala. 308; Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 318; Birmingham D. G. Co. *v.* Finley, 122 Ala. 534, 26 So. 138.

Nebraska: Meyer *v.* Fagan, 34 Neb. 184, 51 N. W. 753.

Where money is attached, loss of credit is of course disallowed as remote. Alabama State Land Co. *v.* Reed, 99 Ala. 19, 13 So. 43.

[91] *Alabama:* Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Marx *v.* Leinkauff, 93 Ala. 453, 460, 9 So. 318; Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138.

Illinois: Oberne *v.* Gaylord, 13 Ill. App. 30.

Kentucky: Mocerf *v.* Stirman, 16 Ky. L. Rep. 587, 29 S. W. 324.

Nebraska: Meyer *v.* Fagan, 34 Neb. 184, 51 N. W. 753.

Ohio: Alexander *v.* Jacoby, 23 Oh. St. 358.

See Com. *v.* Magnolia V. L. & I. Co., 163 Pa. 99, 29 Atl. 793.

Contra, L. Bucki & Son L. Co. *v.* Fidelity & D. Co., 109 Fed. 393, 48 C. C. A. 436.

such damage has been held to be embraced in the attachment bond,[92] and he may also recover the loss of the profit of the contract.[93] If he is able by other means to perform the contract, the expense of the employment of such means may be shown.[94] So in an action on an attachment bond, where the property attached—cattle—was removed from a good range to a bad one, plaintiff was allowed to recover the increased value they would have acquired by being fattened on a good range.[95] But on the other hand no remote or merely speculative loss is a subject of compensation;[96] thus no damages can be recovered for an illegal act of the sheriff, not directed by the defendant, since it is not a proximate result of the attachment;[97] and where after dissolution of the attachment an appeal is taken, no damages can be recovered on the bond because of the appeal.[98] Where property is tied up by a wrongful attachment the owner cannot recover the amount of taxes assessed and paid pending the attachment.[99] Where real estate is attached, the owner's possession not being disturbed, the damages will usually be nominal. No recovery can be had for depreciation in the value of the property,[100] or for loss of credit by reason of the attachment.[101]

Damages may in a proper case be reduced, as by showing that the plaintiff got back his goods without expense or injury by

[92] Carpenter *v.* Stevenson, 6 Bush (Ky.), 259.

[93] State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385.

[94] State *v.* McKeon, 25 Mo. App. 667 (expense of hire of teams to perform contract, for which the teams attached had been provided, may be shown, as establishing the value of the use of the teams attached).

[95] Hoge *v.* Norton, 22 Kan. 374.

[96] *Pennsylvania:* Com. *v.* Magnolia V. L. & I. Co., 163 Pa. 99, 29 Atl. 793.

Texas: Moore *v.* United States F. & G. Co., 52 Tex. Civ. App. 286, 113 S. W. 947.

[97] *Alabama:* Watts *v.* Rice, 75 Ala. 289; Jefferson County Bank *v.* Eborn, 84 Ala. 529, 4 So. 386; Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350.

Illinois: Crow *v.* National Bank, 62 Ill. App. 24.

[98] Gerard *v.* Gateau, 15 Ill. App. 520.

[99] So where property in the hands of a receiver was taxed, it could not be assumed that the receiver would have disposed of the funds so as to escape taxation. Nor are the ordinary expenses of managing the fund chargeable on the bonds since they are incidental to the existence of the fund. Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.

[100] *California:* Heath *v.* Lent, 1 Cal. 410.

Iowa: Tisdale *v.* Major, 106 Iowa, 1, 75 N. W. 663, 68 Am. St. Rep. 263; Ames *v.* Chirurg, 132 N. W. 427.

[101] Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

replevin,[102] by filing a forthcoming or restitution bond,[103] or by default of appearance of the creditor in the attachment suit.[104] It has however been held that the existence of a chattel mortgage on the property would not diminish the plaintiff's recovery.[105]

§ 682a. Counsel fees and expenses in procuring dissolution of attachment.

On the attachment bond the plaintiff may recover his counsel fees and other legal expenses in procuring a dissolution of the attachment,[106] but not expenses incurred in defending the

[102] Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[103] Bick *v.* Lang, 15 Ind. App. 503, 14 N. E. 555.

[104] Groat *v.* Gillespie, 25 Wend. (N. Y.) 383.

[105] Hartmann *v.* Hoffman, 65 App. Div. 443, 72 N. Y. Supp. 982.

[106] *United States:* L. Bucki & Son L. Co. *v.* Fidelity & D. Co., 109 Fed. 393, 48 C. C. A. 436.

Alabama: Dothard *v.* Sheid, 69 Ala. 135; Troy *v.* Rogers, 113 Ala. 131, 20 So. 999; Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136.

Arkansas: Boatwright *v.* Stewart, 37 Ark. 614.

Florida: Gonzales *v.* De Funiak H. T. Co., 41 Fla. 471, 26 So. 1012.

Georgia: Fourth Nat. Bank *v.* Mayer, 96 Ga. 728, 24 S. E. 453.

Illinois: Damron *v.* Sweetser, 16 Ill. App. 339.

Indiana: Trentman *v.* Wiley, 85 Ind. 33.

Iowa: Porter *v.* Knight, 63 Ia. 365, 19 N. W. 282; Peters *v.* Snavely-Ashton, 144 Ia. 147, 122 N. W. 836.

Kentucky: United States F. & G. Co. *v.* Hows, 109 S. W. 343, 33 Ky. L. Rep. 131; Blakely *v.* Bogard, 136 S. W. 616.

Louisiana: Littlejohn *v.* Wilcox, 2 La. Ann. 620; Accessory T. Co. *v.* McCerren, 13 La. Ann. 214.

Michigan: Swift *v.* Plessner, 39 Mich. 178.

Mississippi: Buckley *v.* Van Diver, 70 Miss. 622, 12 So. 905.

Missouri: State *v.* O'Neill, 4 Mo. App. 221 (including fees in proceedings for dissolution after attachment dissolved by giving bond); State *v.* Allen, 124 Mo. App. 465, 103 S. W. 1090; State *v.* Flarsheim, 13 Mo. App. 1, 119 S. W. 17.

Nebraska: Raymond *v.* Green, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763.

New York: Hartmann *v.* Burtis, 65 App. Div. 481, 72 N. Y. Supp. 914; Epstein *v.* United States F. Co., 29 Misc. 295, 60 N. Y. Supp. 527; Marks *v.* Massachusetts B. & I. Co., 117 N. Y. Supp. 1019.

Ohio: Alexander *v.* Jacoby, 23 Oh. St. 358.

Oregon: Drake *v.* Sworts, 24 Ore. 198, 33 Pac. 563.

Pennsylvania: Com. *v.* Magnolia V. L. & I. Co., 163 Pa. 99, 29 Atl. 793; Berwald *v.* Ray, 165 Pa. 192, 30 Atl. 727.

Washington: Helfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

No counsel fees can be recovered if the suit was not defended. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391. Or if no attachment was in fact made, since no defense was necessary. State *v.* Binney, 127 Mo. App. 710, 106 S. W. 1114. But fees may be recovered even if the attempt to vacate the attach-

principal suit; [107] and if there were no expenses caused solely by the attachment proceedings, there can be no recovery on this account.[108] Recovery of legal expenses includes necessary travelling fees in attending court.[109] In a few States no recovery can be had for counsel fees unless they have actually been paid.[110] No recovery can be had on the bond for the legal expenses of a third person who intervened to claim the goods.[111]

In a few States the statute under which the bond is given is interpreted as allowing a recovery on the bond of the legal expenses in the entire suit.[112]

§ 683. Exemplary damages.

Under the statutes of some States, if the wrongful attach-

ment failed, if the motion was not denied on the merits, and the attaching party ultimately failed on the main issue. Tyng *v.* American Surety Co., 69 App. Div. 137, 74 N. Y. Supp. 502.

[107] *Florida:* Gonzales **v.** De Funiak H. T. Co., 41 Fla. 471, 26 So. 1012.

Illinois: Danron *v.* Sweetser, 16 Ill. App. 339.

Iowa: Porter *v.* Knight, 63 Ia. 365, 19 N. W. 282; Ames *v.* Chirurg, 132 N. W. 427.

Kentucky: Vannatta *v.* Vannatta, 21 Ky. L. Rep. 1464, 55 S. W. 685.

Louisiana: Adam *v.* Gomila, 37 La. Ann. 479.

Minnesota: Frost *v.* Jordan, 37 Minn. 544, 36 N. W. 713 (though the attachment was necessary to give jurisdiction).

New York: Northampton Nat. Bank *v.* Wylie, 52 Hun, 146, 4 N. Y. Supp. 907, 26 N. Y. St. Rep. 286, 16 N. Y. Civ. Proc. 326.

Ohio: Alexander *v.* Jacoby, 23 Oh. St. 358.

Washington: Helfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

If one sum is paid for the entire defence, such part of it as is reasonably to be charged to the attachment may be recovered. McClure *v.* Renaker, 21 Ky. L. Rep. 360, 51 S. W. 317.

In New York if the attachment is necessary to found jurisdiction it has been held that where the suit is dismissed on the merits counsel fees on the whole suit may be recovered. Fixel *v.* Tallman, 116 N. Y. Supp. 639.

[108] Northampton Nat. Bank *v.* Wylie, 52 Hun, 148, 4 N. Y. Supp. 907, 26 N. Y. St. Rep. 286, 16 N. Y. Civ. Proc. 326.

[109] State *v.* Shobe, 23 Mo. App. 474.

[110] *California:* Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

Kentucky: Shulz *v.* Morrison, 3 Met. 98.

Contra, Missouri: Holthaus *v.* Hart, 9 Mo. App. 1; State *v.* Gage, 52 Mo. App. 464.

New York: Epstein *v.* U. S. Fidelity Co., 29 Misc. 295, 60 N. Y. Supp. 527; Marks *v.* Massachusetts B. & I. Co., 117 N. Y. Supp. 1019. See *post*, § 685, *n.*

[111] *Alabama:* Thompson *v.* Gates, 18 Ala. 32 (by claim of title); Flournoy *v.* Lyon, 70 Ala. 308 (by claim as garnishee).

North Carolina: Stein *v.* Cozart, 122 N. C. 280, 30 S. E. 340 (by claim of title).

[112] Greaves *v.* Newport, 41 Minn. 240, 42 N. W. 1059.

ment be malicious, exemplary damages may be recovered in an action on the bond.[113] This is the same measure of damages which is adopted in an action of tort for malicious attachment.[114] The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for "the wrongful or the vexatious" suing out of the writ.[115] As a consequence of this right to recover exemplary damages, probable cause may be shown in mitigation.[116]

In most jurisdictions exemplary damages cannot be recovered in an action on the bond, since the action is for breach of a contract, in which exemplary damages cannot be had.[117]

§ 684. Forthcoming bonds—Bonds to dissolve attachment—Receiptors.

Bonds to dissolve attachment (also called forthcoming bonds)

[113] *Alabama:* Kirksey *v.* Jones, 7 Ala. 622; McCullough *v.* Walton, 11 Ala. 492; Sharpe *v.* Hunter, 16 Ala. 765; Forrest *v.* Collier, 20 Ala. 175; Seay *v.* Greenwood, 21 Ala. 491; Dothard *v.* Sheid, 69 Ala. 135; City Nat. Bank *v.* Jeffries, 73 Ala. 183; Watts *v.* Rice, 75 Ala. 289; Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71; Mobile F. C. Co. *v.* Little, 108 Ala. 399, 19 So. 443; Van Diver *v.* Waller, 143 Ala. 411, 39 So. 136.

Iowa: Gaddis *v.* Lord, 10 Ia. 141; Nordhaus *v.* Peterson, 54 Ia. 68, 6 N. W. 77; International H. Co. *v.* Iowa H. Co., 122 N. W. 951.

Tennessee: Doll *v.* Cooper, 9 Lea, 576; Renkert *v.* Elliott, 11 Lea, 235.

Washington: Sloane *v.* Langert, 6 Wash. 26, 32 Pac. 1015; Levy *v.* Fleischner, 12 Wash. 15, 40 Pac. 384.

No damages can be recovered by the plaintiff, it has been held, where the malice was directed against a third person only. Wood *v.* Barker, 37 Ala. 60. Nor where there is no actual damage. Helfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

Exemplary damages cannot be recovered against a principal for the act of his agent. Jackson *v.* Smith, 75 Ala. 97. Unless it was ratified by the principal with full knowledge. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391. A corporation may be subjected to exemplary damages for the act of its agent. Jefferson County Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

In Washington "exemplary damages" does not mean damages by way of punishment but indeterminable actual damages such as damages to reputation, pride, and feeling. Levy *v.* Fleischner, 12 Wash. 15, 40 Pac. 384.

[114] *Ante*, § 467.

[115] On a *ne exeat* bond, under a statute providing only for damages caused by the "wrongful" suing out of the writ, it was held that the plaintiff could recover his actual damages; but that if he would recover damages as for a malicious act, he must sue in case. Spivey *v.* McGehee, 21 Ala. 417.

[116] Metcalf *v.* Young, 43 Ala. 643. As, advice of counsel. Raver *v.* Webster, 3 Ia. 502.

[117] *Arkansas:* Goodbar *v.* Lindsley,

are conditioned sometimes to produce the property, sometimes to pay the judgment, sometimes in the alternative to do one or the other. If the bond binds the party to pay the judgment, the measure of damages for a breach of it is the amount of the judgment.[118] If, however, the bond is in the alternative, or is merely to produce the property, the limit of recovery, if the property is not produced, is the value of the property at the time it was given,[119] limited, however, by the amount of the judgment, with interest and costs.[120]

If the property is returned there is of course no breach of the bond; and if a portion of it is returned, the recovery is for the balance only.[121] If the property is returned in a damaged condition, the measure of damages is the amount of the deterioration.[122] If the property is not returned, but an excuse is offered which is sufficient, there can be no recovery; as where live-stock

51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.

California: Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

Georgia: Fourth Nat. Bank *v.* Mayer, 96 Ga. 728, 24 S. E. 453.

South Carolina: McClendon *v.* Wells, 20 S. C. 514.

[118] *Florida:* Collins *v.* Mitchell, 3 Fla. 4 (*semble*).

Kentucky: Keel *v.* Ogden, 3 Dana, 103.

Massachusetts: Berry *v.* Wasserman, 179 Mass. 537, 61 N. E. 228.

Michigan: Phansteihl *v.* Vanderhoof, 22 Mich. 296.

New York: Morange *v.* Edwards, 1 E. D. Smith, 414.

[119] *California:* Hammond *v.* Starr, 79 Cal. 556; Curtin *v.* Harvey, 120 Cal. 620, 52 Pac. 1077.

Florida: Collins *v.* Mitchell, 3 Fla. 4.

Georgia: Jolley *v.* Rutherford, 112 Ga. 342, 37 S. E. 358.

Kentucky: Moon *v.* Story, 2 B. Mon. 354 (*semble*).

Mississippi: Irion *v.* Hume, 50 Miss. 419.

Missouri: Lee *v.* Moore, 12 Mo. 458; McDonald *v.* Loewen (Mo. App.), 130 S. W. 52.

New York: Bruck *v.* Feiner, 26 Misc. 724, 56 N. Y. Supp. 1025.

Rhode Island: Pearce *v.* Maguire, 17 R. I. 55, 20 Atl. 98.

Texas: Jones *v.* Hays, 27 Tex. 1.

[120] *Alabama:* McElrath *v.* Whetstone, 89 Ala. 623, 8 So. 7.

California: Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066.

Georgia: Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643; Jolley *v.* Rutherford, 112 Ga. 342, 37 S. E. 358.

Indiana: Mitchell *v.* Denbo, 3 Blackf. 259.

Louisiana: Canfield *v.* McLaughlin, 10 Martin, 48.

Missouri: Lee *v.* Moore, 12 Mo. 458.

Texas: Wallace *v.* Terry (Tex. Civ. App.), 15 S. W. 35.

Interest cannot be added where the defendant was obliged by legal process to hold the amount as garnishee. Huntress *v.* Burbank, 111 Mass. 213.

[121] Lee *v.* Moore, 12 Mo. 458.

[122] *Colorado:* Creswell *v.* Woodside, 8 Colo. App. 514, 46 Pac. 842.

Louisiana: Lallande *v.* Trezevant, 39 La. Ann. 830, 2 So. 573.

was taken and died without the fault of the defendant,[123] or a slave was taken and died [124] or was emancipated.[125] It is no excuse to show that the property did not belong to the debtor [126] unless indeed it was taken by the true owner.[127] If the goods were subject to a prior mortgage, which subjected the property to the satisfaction of the debt, the defendant is not excused, since he might have kept and produced the property by paying the mortgage; but the damages are nominal only.[128]

The liability of a receiptor is much the same. He is responsible for the value of the goods, as valued in the receipt; [129] and if goods are taken from him on a prior mortgage the value of the goods so taken is deducted from the value in the receipt.[130] So if goods are taken away by a paramount owner, the value of them is deducted.[131]

No recovery can be had on the bond for counsel fees incurred after the dissolution of the attachment.[132]

§ 684a. Bonds to indemnify attaching sheriff.

Where a bond is given to an attaching sheriff to indemnify him, he is entitled to recover all damages suffered by him, but not damages suffered by the creditor.[133] He may recover the amount of a judgment recovered against him because of the attachment, even though he has not paid it and is not solvent,[134]

[123] Carr *v.* Houston G. & W. Co., 105 Ga. 268, 31 S. E. 178 (the burden is on the defendant to show that he was without fault).

[124] Haralson *v.* Walker, 23 Ark. 415.

[125] Irion *v.* Hume, 50 Miss. 419.

[126] *Illinois:* Gray *v.* McLean, 17 Ill. 404.

Michigan: Dorr *v.* Clark, 7 Mich. 310.

[127] Gray *v.* McLean, 17 Ill. 404 (*semble*).

[128] Dehler *v.* Held, 50 Ill. 491.

[129] *Massachusetts:* Wakefield *v.* Stedman, 12 Pick. 562.

New Hampshire: Healy *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332; Cross *v.* Brown, 41 N. H. 283.

[130] Healy *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332.

[131] Haynes *v.* Tenney, 45 N. H. 183; Spear *v.* Hill, 52 N. H. 323; Stone *v.* Sleeper, 59 N. H. 205.

[132] State *v.* Fargo, 151 Mo. 280, 52 S. W. 199.

[133] *Delaware:* Staats *v.* Herbert, 4 Del. Ch. 508.

Iowa: Constantine *v.* Rowland, 124 N. W. 189.

Mississippi: Moore *v.* Lowrey, 74 Miss. 413, 21 So. 237.

Pennsylvania: Clement *v.* Courtright, 9 Pa. Super. Ct. 45.

[134] *Kansas:* Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230.

Massachusetts: Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003.

Nevada: Jones *v.* Child, 8 Nev. 121.

New York: Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 (*semble*).

together with his costs,[135] not exceeding the amount of the penalty with interest.[136] No damages can be recovered which were not the result of the particular attachment for which the bond was given,[137] and therefore (since they could be allowed only for some personal malice or other wrong of the sheriff itself) no exemplary damages can be allowed.[138]

In some jurisdictions the bond enures to the benefit of the attachment or execution defendant, who may therefore recover his damages; which would be the value of the property, if it has been sold,[139] and all such damages as he could recover on an attachment bond.[140]

§ 685. Injunction bonds—General principles.

An injunction bond is a statutory bond, and its form is governed by the statute, which therefore determines what will amount to a breach,[141] and what damages are covered by the

Ohio: Miller *v.* Rhoades, 20 Oh. St. 494.

Oklahoma: Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

Contra, California: Oaks *v.* Scheifferly, 74 Cal. 478, 16 Pac. 252 (but see White *v.* Fratt, 13 Cal. 521).

In Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483, binding force was refused to the judgment because the sheriff by collusion prevented the present defendants from presenting their defence in the earlier suit.

[135] *California:* Stark *v.* Raney, 18 Cal. 622.

New York: Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533.

Washington: Brotton *v.* Lunkley, 11 Wash. 581, 40 Pac. 140.

[136] *Massachusetts:* White *v.* French, 15 Gray, 339.

New York: Casani *v.* Dunn, 44 App. Div. 248, 60 N. Y. Supp. 756.

Texas: Stevens *v.* Wolf, 77 Tex. 215, 14 S. W. 29.

[137] *Idaho:* Fury *v.* White, 2 Ida. 639, 23 Pac. 535.

Massachusetts: Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003.

[138] *Iowa:* Constantine *v.* Rowland, 147 Ia. 142, 124 N. W. 189.

Virginia: Crump *v.* Ficklin, 1 P. & H. 201.

[139] *Kentucky:* Winstead *v.* Hicks, 121 S. W. 1018.

Michigan: Lee *v.* Maxwell, 98 Mich. 496, 57 N. W. 581.

Virginia: Crump *v.* Ficklin, 1 P. & H. 201.

[140] Manning *v.* Grinstead, 90 S. W. 553, 28 Ky. L. R. 787.

[141] Dismissal of the suit is *prima facie* evidence that injunction was wrongfully issued. Findlay *v.* Carson, 97 Ia. 537, 66 N. W. 759. Final dismissal on the merits is conclusive. Bemis *v.* Gannett, 8 Neb. 236; Manufacturers' Bank *v.* Dare, 67 Hun (N. Y.), 44, 21 N. Y. Supp. 806. Vacation of temporary injunction not conclusive when court on final hearing found plaintiff entitled to injunction. New York S. & T. Co. *v.* Lipman, 83 Hun (N. Y.), 569, 32 N. Y. Supp. 65. Dissolution of injunction by plaintiff under order of court as penalty for contempt not a determination that it was wrongfully issued. Apollinaris Co. *v.* Venable, 136 N. Y. 46, 32 N. E. 555. Agree-

bond.[142] Where the obligee of the bond is an official, or other nominal party, the real party in interest should bring suit on the bond.[143] The recovery cannot exceed the amount of the penalty, with interest;[144] actual damages must be proved,[145] and remote damages cannot be allowed.[146]

ment to submit dispute to arbitration and finding by arbitrators against plaintiff not a judgment as to injunction. Columbus, etc., Ry. *v.* Burke, 54 Oh. St. 98, 34 N. E. 282. Discontinuance by plaintiff is not a decision as to issuance of injunction. Palmer *v.* Foley, 71 N. Y. 106; Johnson *v.* Elwood, 82 N. Y. 362; De Berard *v.* Priale, 34 App. Div. 502, 54 N. Y. Supp. 534; Taylor Worsted Co. *v.* Beolchi, 37 N. Y. Misc. 691, 76 N. Y. Supp. 379. But see N. Y. Cent. & H. R. R. R. *v.* Hastings-on-Hudson, 9 App. Div. 256, 41 N. Y. Supp. 492. Injunction against several acts dissolved as to all but one act; damages sustained by the injunction recoverable except those sustained by that part of the injunction which was continued. Pierson *v.* Ells, 46 Hun (N. Y.), 336.

[142] *Mississippi:* Martin *v.* Kelly, 59 Miss. 652; Williams *v.* Bank of Commerce, 71 Miss. 858, 16 So. 238.

New Hampshire: Towle *v.* Towle, 46 N. H. 431.

Special damages must be alleged:

United States: Sullivan *v.* Cartier, 147 Fed. 222, 77 C. C. A. 448.

Montana: Parker *v.* Bond, 5 Mont. 1, 1 Pac. 209.

And in the absence of proof of damage, nominal damages may be recovered on breach: Stone *v.* Cason, 1 Ore. 100. But see Foster *v.* Stafford Nat. Bank, 58 Vt. 658, 5 Atl. 890.

[143] *California:* Lally *v.* Wise, 28 Cal. 539.

Colorado: Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378.

Montana: Helena *v.* Brulo, 15 Mont. 429, 39 Pac. 456.

But see *New York:* Andrews *v.* Glenville Woolen Co., 50 N. Y. 282.

In Montana Mining Co. *v.* St. Louis M. & M. Co., 19 Mont. 313, 48 Pac. 305, where the obligation ran to several parties it was held that they must sue jointly, though their interests were different.

Where a bond runs to a corporation no recovery can be had on it for damages to the stockholders. Eaton *v.* Larimer & W. R. Co., 3 Colo. App. 366, 33 Pac. 278.

[144] *Alabama:* Ehrman *v.* Stanfield, 80 Ala. 118.

Kentucky: Hughes *v.* Wickcliffe, 11 B. Mon. 202.

New York: Hovey *v.* Rubber Tip Pencil Co., 38 N. Y. Super. Ct. 428.

Vermont: Glover *v.* McGaffey, 56 Vt. 294.

West Virginia: Peerce *v.* Athey, 4 W. Va. 22; State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301.

But see *Louisiana:* Jackson *v.* Larche, 11 Mart. 284.

Damages allowed in the original suit upon dissolution may exceed the penalty named in the bond: Kohlsaat *v.* Crate, 144 Ill. 14, 32 N. E. 481; but in that case only the penalty, with interest and costs, may be recovered in an action on the bond. Lawton *v.* Green, 64 N. Y. 326.

[145] *Louisiana:* Meaux *v.* Pittman, 35 La. Ann. 360.

Tennessee: Boyd *v.* Knox, 53 S. W. 972.

Washington: White *v.* Brooke, 11 Wash. 99, 39 Pac. 237.

[146] *United States:* Lehman *v.* McQuown, 31 Fed. 138.

Whether damages shall be assessed in the original suit or in an action on the bond depends upon the law of the jurisdiction, or the terms of the bond.[147] If they are legally assessed in the original suit, the amount so found is conclusive.[148] If they are not so assessed, they may be found in an action on the bond.[149]

Where the injunction is immediately vacated, no damages can be recovered, since none were suffered, though the suit itself goes on; [150] and if the plaintiff disobeys the injunction from the first, though he is not thereby barred from action on the bond,[151] still as he suffered no damages he can recover none.[152] If a preliminary injunction was made perpetual on the hearing, but upon appeal it was dissolved, recovery can be had on the bond only to the time when the injunction was made perpetual; [153] but if at the hearing a dissolution is decreed, and an appeal taken, and the decree affirmed, recovery can be had on the bond for all damages, including those accrued while the appeal was pending.[154]

If the injunction was against doing an illegal act the plaintiff,

England: Smith *v.* Day, 21 Ch. D. 421, 31 Wkly. Rep. 187.

[147] *United States:* Meyers *v.* Block, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. 525 (damages on the bond by its terms to be recovered in action on bond); West *v.* East Coast Cedar Co., 113 Fed. 742, 51 C. C. A. 416 (damages may be recovered in original suit).

Arkansas: Blakeney *v.* Ferguson, 18 Ark. 347 (damages must be so assessed).

Contra, Alabama: Bogacki *v.* Welch, 94 Ala. 429, 10 So. 330.

[148] Lothrop *v.* Southworth, 5 Mich. 436.

[149] *Illinois:* Hibbard *v.* McKindley, 28 Ill. 240; Brown *v.* Gorton, 31 Ill. 416; Edwards *v.* Edwards, 31 Ill. 474; Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692.

New Hampshire: Jackman *v.* Eastman, 62 N. H. 273.

New Jersey: Easton *v.* New York, etc., Ry., 26 N. J. Eq. 359.

[150] Hyde *v.* Teal, 46 La. Ann. 645, 15 So. 416.

[151] *Illinois:* Colcord *v.* Sylvester, 66 Ill. 540.

Maryland: Phœnix Pad Co. *v.* U. S., 111 Md. 549, 75 Atl. 394.

Missouri: Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19.

[152] *Maryland:* Phœnix Pad Co. *v.* U. S., 111 Md. 549, 75 Atl. 394.

Missouri: Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19.

[153] *California:* Webber *v.* Wilcox, 45 Cal. 301; Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Illinois: Milligan *v.* Nelson, 188 Ill. 139, 58 N. E. 938.

So where an injunction is modified so as to permit the act restrained, damages can be recovered only up to the time of modification. Tyler Mining Co. *v.* Last Chance Mining Co., 90 Fed. 15, 32 C. C. A. 498.

[154] *Maryland:* Hamilton *v.* State, 32 Md. 348.

But see *Missouri:* C. H. Albers C. Co. *v.* Spencer, 139 S. W. 321.

though entitled to recover, cannot get damages for not being allowed to do the illegal act.[155] When the injunction was ambiguous, the person enjoined is entitled to such damages as he may have sustained by obeying it as he reasonably understood it.[156]

Upon an undertaking or bond entered into as a condition of granting a temporary restraining order damages cannot be allowed after the order is superseded by an injunction.[157]

§ 685a. Injunction preventing use of land.

Where the injunction prevented the use of land, the owner may recover on the bond the value of the use of land, which in the ordinary case would be its rental value, for the time during which he was deprived of the use.[158] If a crop was made from the land, or other mesne profits were realized by the defendant on the bond, the owner is entitled to recover the value.[159] If the land is under lease, the plaintiff may recover the rent reserved during the period.[160]

If the defendant committed waste while the injunction was in force, the amount of the waste may be recovered on the bond; [161] and so if personal property prepared for use in connection with the land and on the land is lost or depreciates in

[155] Turnpike Co. *v.* Kelley, 41 Oh. St. 144.

If the question of the legality of the acts was passed upon in the original action in favor of the present plaintiff, their illegality cannot be set up in an action on the bond. Omaha Lith. Co. *v.* Simpson, 29 Neb. 96, 45 N. W. 261.

[156] Webb *v.* Laird, 62 Vt. 448, 20 Atl. 599, 22 Am. St. Rep. 121.

[157] Houghton *v.* Cortelyou, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. ed. 432.

[158] Wadsworth *v.* O'Donnell, 7 Ky. L. Rep. 837 (*i. e.*, rental value for any purpose; but in Alexander *v.* Colcord, 85 Ill. 323, the court appears to have confined the plaintiff to its value for the use he intended to make of it).

[159] *California:* Rice *v.* Cook, 92 Cal. 144, 38 Pac. 219.

Georgia: Richardson *v.* Allen, 74 Ga. 719.

Illinois: Edwards *v.* Edwards, 31 Ill. 474; Hosmer *v.* Campbell, 98 Ill. 572.

Indiana: Rutherford *v.* Moore, 24 Ind. 311.

New York: Roberts *v.* White, 73 N. Y. 375.

[160] *New York:* Bray *v.* Poillon, 4 Thomps. & C. 663.

Vermont: Sturges *v.* Knapp, 36 Vt. 439 (railroad).

[161] *Georgia:* Richardson *v.* Allen, 74 Ga. 719.

Illinois: Alexander *v.* Colcord, 85 Ill. 323 (cutting timber).

Indiana: Winship *v.* Clendenning, 24 Ind. 439 (cutting timber).

North Carolina: Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61 (cutting timber).

value, recovery may be had for the damage.[162] So where trees had been girdled preparatory to being cut for timber before the injunction, and during the injunction they greatly deteriorated in value, the amount of the deterioration could be recovered.[163] But where the land at the time of the injunction had a purely speculative value, due to the belief that it contained oil, and before the injunction was dissolved it had been found that there was no oil in the land and its value fell, this depreciation in value (in the absence of evidence that a specific offer to pay the high price was lost because of the injunction) is too remote.[164]

§ 685b. Injunction against taking a profit from land.

Where the injunction is against taking some profit from the land, without restraining its use for other purposes, the plaintiff may recover the loss caused by failure to get the profit at the time. So where the injunction prevented the harvesting of an annual crop,[165] the cutting of ice,[166] mining,[167] getting crude petroleum,[168] or cutting timber,[169] the measure of damages is the profit that might have been realized from the operation.

Consequential damages may be recovered in a proper case; as for the expense of moving a saw-mill and machinery to another tract of land, in order not to lose the use of it, and then moving it back again.[170] But merely speculative damages cannot be recovered,[171] nor damages which should have been

[162] *Illinois:* Alexander *v.* Colcord, 85 Ill. 323 (materials for fencing).

Tennessee: South Penn Oil Co. *v.* Stone (Tenn. Ch.), 57 S. W. 374 (machinery for oil wells).

[163] Drews *v.* Williams, 50 La. Ann. 579, 2 So. 897.

[164] South Penn Oil Co. *v.* Stone (Tenn. Ch.), 57 S. W. 374.

[165] Collins *v.* Sinclair, 51 Ill. 328.

[166] Brown *v.* Cunningham, 82 Iowa, 512, 48 N. W. 1042, 12 L. R. A. 583.

[167] *United States:* Corsair M. Co. *v.* Carolina M. Co., 75 Fed. 860.

Colorado: Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

Iowa: Findlay *v.* Carson, 97 Iowa, 537, 66 N. W. 759.

So of removing sand: Chicago T. & T. Co. *v.* Chicago, 209 Ill. 172, 70 N. E. 572.

[168] Livingston *v.* Exum, 19 S. E. 223.

[169] *South Carolina:* Moorer *v.* Andrews, 36 S. C. 427, 17 S. E. 948.

Texas: French *v.* McCready (Tex. Civ. App), 57 S. W. 894.

Vermont: Lillie *v.* Lillie, 55 Vt. 470.

[170] French *v.* McCready (Tex. Civ. App.), 57 S. W. 894.

[171] *United States:* Coosaw Min. Co. *v.* Carolina Mfg. Co., 75 Fed. 860 (phosphate rock of fluctuating value).

Illinois: Chicago T. & T. Co. *v.* Chicago, 209 Ill. 172, 70 N. E. 572 (uncertain fluctuating deposits of sand and gravel).

avoided by the plaintiff;[172] and where the injunction restrained the plaintiff from cutting timber on certain land, the defendant, in an action on the bond, may show that the plaintiff had no title to the land and no right to cut timber on it.[173] Where pending the injunction loss was caused by act of God, as by flood or wind, damages cannot be recovered on the bond, since they were not caused by the injunction.[174]

§ 685c. Other injunctions concerning land.

Where the use of an irrigation ditch is enjoined, and plaintiff could not have obtained water elsewhere, he may recover for the resulting loss of crops.[175] If water can be procured elsewhere, the expense and trouble of so procuring it may be recovered.[176] If an irrigation company is enjoined from cutting off a water supply, it cannot recover on the bond for the water furnished during the pendency of the injunction, where the defendant is solvent,[177] but must enforce payment for the water by an ordinary action.

Where one is enjoined from interfering with a tenant or collecting rents the plaintiff on the bond may recover the amount of the rent he has lost,[178] which would ordinarily be nothing unless the tenant had become insolvent or had vacated the premises because of the injunction, or the defendant had collected rent.[179] If the person enjoined was mortgagee he cannot recover so long as the security is ample.[180]

In case of an injunction against moving a house the party

Kentucky: Epenbaugh *v.* Gooch, 15 Ky. L. Rep. 576 (profits of cutting timber).

[172] *Iowa:* Behrens *v.* McKenzie, 23 Ia. 333, 92 Am. Dec. 428 (loss of moulded brick by rain).

Kentucky: United States F. & G. Co. *v.* Jones, 33 Ky. L. Rep. 737, 111 S. W. 298 (loss of use of teams); Citizens' T. & G. Co. *v.* Ohio Valley Tie Co., 128 S. W. 317.

North Carolina: Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61 (loss of use of teams).

[173] Jenkins *v.* Parkhill, 25 Ind. 473.

[174] *Illinois:* Chicago T. & T. Co. *v.* Chicago, 209 Ill. 172, 70 N. E. 572.

Kentucky: Citizens' T. & G. Co. *v.* Ohio Valley Tie Co., 128 S. W. 317.

[175] Mack *v.* Jackson, 9 Colo. 536, 13 Pac. 542.

[176] Rohwer *v.* Chadwick, 7 Utah, 385, 26 Pac. 1116.

[177] Edmison *v.* Sioux Falls Water Co., 14 S. D. 486, 85 N. W. 1016.

[178] Sturgis *v.* Knapp, 33 Vt. 486 (a railroad lease).

[179] McDonald *v.* James, 38 N. Y. Super. Ct. 76, 47 How. Pr. 474.

[180] Schening *v.* Cofer, 97 Ala. 726, 12 So. 414.

enjoined cannot recover for loss of use of tools and machinery used to support the house, since the injunction did not prevent him from removing such tools and machinery from the house.[181] And where the injunction was to prevent the removal of certain buildings which could not be removed as structures, but would have to be torn down, and the material removed, it was held that the amount of damages was the loss in the value of the buildings and material between the time when the injunction was issued and the time when it was dissolved, with interest during that time.[182]

§ 685d. Injunctions against doing work.

Where one is prevented by an injunction from doing work, he may recover for injury by the delay to materials collected for the work,[183] but not, it has been held, for loss of workmen [184] or for the increased cost of doing the work after the injunction was dissolved.[185] For mere delay in performance, without evidence of special damage by waste of materials or labor, only nominal damages can be recovered.[186]

In a case where a street railway was enjoined from repairing a break in their line, and after the break passengers walked round the obstruction, and in consequence of the injunction the company ceased running cars beyond the break and reduced fares because of the shorter distance run, it was held that the company could recover the decrease in tolls arising from the decrease in travel caused by the break in the line, but could not recover the decrease in tolls arising from stopping the cars beyond the break and reducing fares.[187]

In a case where the plaintiff was enjoined from doing certain work on a railroad, it was held that he could recover interest on money detained from him on his contract during the pendency of the injunction, from the time when the contract would have been completed until the dissolution of the injunction;

[181] Hermann *v.* Allen (Tex.), 128 S. W. 115.

[182] Ridpath *v.* Merriam, 22 Wash. 311, 60 Pac. 1120.

[183] Dougherty *v.* Dore, 63 Cal. 170 (materials for grading washed away).

[184] Moorer *v.* Andrews, 39 S. C. 427, 17 S. E. 948.

[185] Morgan *v.* Negley, 53 Pa. 153.

[186] Cooper *v.* Hames, 93 Ala. 280, 9 So. 341.

[187] Hawthorne *v.* McArthur, 8 Ky. L. Rep. 526.

and the cost of putting the work in the same condition it was in when the injunction was served.[188]

§ 685e. Injunctions against carrying on business.

Where the injunction prevents the carrying on of a business, the plaintiff on the bond can recover the profits he was prevented from realizing, provided the business was an established one so that the amount of profits can be shown with sufficient certainty.[189] The profits expected from a new business are of course too uncertain and conjectural for recovery.[190]

The plaintiff may recover the value of the use of the premises, and wages paid for guarding the property and to the employees under contract of service.[191] Where the plaintiff was enjoined from working a mine, it was held he could recover the value of the time while he was necessarily idle; [192] and for necessary expense of keeping the mine clear of water.[193] He may recover for a loss of property on account of the injunction.[194] If in spite of the injunction it appears that the plaintiff persisted in carrying on his business and he cannot show the loss of any sales on account of the injunction, he can recover nothing for loss of business.[195]

[188] St. Louis, I. M. & S. Ry. *v.* Schneider, 30 Mo. App. 620.

[189] *California:* Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Illinois: Landis *v.* Wolf, 206 Ill. 392, 69 N. E. 103.

Virginia: Whitehead *v.* Cape Henry Syndicate, 111 Va. 193, 68 S. E. 263 (*semble*).

Washington: Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

Wisconsin: Gear *v.* Shaw, 1 Pin. 608.

In Schlesiger *v.* Bedford, [1893] W. N. 57, 9 T. L. Rep. 370, where the injunction was against producing a play, the lost profits from this particular play were allowed, deducting, however, the earnings from another play produced instead of it.

[190] *Illinois:* Chicago C. Ry. *v.* Howison, 86 Ill. 215 (extension of railroad).

New York: Manufacturers' & Traders' Bank *v.* C. W. F. Dare Co., 67 Hun, 44, 21 N. Y. Supp. 806 (manufacture).

Virginia: Whitehead *v.* Cape Henry Syndicate, 111 Va. 193, 68 S. E. 263 (fishery).

[191] Wood *v.* State, 66 Md. 61 (injunction against working a saw-mill).

[192] Muller *v.* Fern, 35 Ia. 420. The burden is here upon the plaintiff to show due diligence in seeking other employment, for he must show that he was damaged; the case differs from an action on a contract of service, where it is for the defendant to show why he should not pay the amount named in the contract.

[193] Tyler Mining Co. *v.* Last Chance Mining Co., 90 Fed. 15, 32 C. C. A. 498.

[194] Hotchkiss *v.* Platt, 8 Hun (N. Y.), 46.

[195] Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

§ 685f. Injunctions against constructing a building or other work.

In case of injunction against constructing a building, the owner may recover the value of the use during the period of delay.[196] Where the plaintiff was enjoined from building a stable he was allowed to recover for injury to his cattle by being without shelter, and for the decreased supply of milk.[197] And where the injunction is against repairing and rebuilding a dam, he may recover for the consequent loss of use of his mill.[198] He may also recover any increase in the cost of construction due to the injunction,[199] and any loss of labor or materials caused by the interruption of the work.[200]

§ 685g. Injunctions against collecting a judgment or other debt.

When the collection of a judgment or other debt is enjoined, the bond is sometimes conditioned on paying the amount of the debt if the injunction is dissolved; and upon such a bond of course the entire amount of the debt may be collected,[201] including such costs, damages and interest as may have been included in the judgment.[202] But on the ordinary form of bond the amount of the debt cannot be recovered unless for some reason it has ceased to be collectible.[203] If the statute of limitations has run and the debt has thus become barred pending the

[196] Hutchins *v.* Munn, 209 U. S. 246, 28 Sup. Ct. 504, 52 L. ed. 776.

[197] Lange *v.* Wagner, 52 Md. 310, 36 Am. Rep. 380. One not himself a party to the injunction cannot recover. Marengo County *v.* Matkin, 144 Ala. 574, 42 So. 33.

[198] Webb *v.* Laird, 62 Vt. 448, 20 Atl. 599, 22 Am. St. Rep. 121.

[199] Morgan *v.* Negley, 53 Pa. 153 (railroad; but not where the premises are sold pending the injunction).

[200] Creek *v.* McManus, 17 Mont. 445, 43 Pac. 497.

[201] *United States:* Allen *v.* Jones, 79 Fed. 698.

Arkansas: Hunt *v.* Burton, 18 Ark. 188.

Illinois: Roberts *v.* Fahs, 36 Ill. 268. In Ryan *v.* Anderson, 25 Ill. 372, recovery was not allowed because the bond did not run to the person entitled to payment.

[202] *Alabama:* Moore *v.* Harton, 1 Port. 15.

Virginia: Fox *v.* Mountjoy, 6 Munf. 36.

[203] *Arkansas:* Neal *v.* Taylor, 56 Ark. 521, 20 S. W. 352 (form of bond changed since decision in Hunt *v.* Burton, *supra*).

Illinois: Rosenthal *v.* Boass, 27 Ill. App. 430.

Iowa: Grove *v.* Bush, 86 Iowa, 94, 53 N. W. 88.

Louisiana: Hefner *v.* Hesse, 29 La. Ann. 149.

Texas: Dillard *v.* Stringfellow, 50 Tex. Civ. App. 410, 111 S. W. 769 (injunction against levy of execution).

injunction, the loss of the debt thereby caused must be compensated.[204] If the debtor has become insolvent, pending the injunction, and a part or the whole of the debt has thereby been lost, the amount so lost may be recovered;[205] but this involves proof that the debt could have been recovered before the injunction,[206] and also that at least a portion of it cannot be recovered after the dissolution.[207] So where the enforcement of an execution was enjoined, and the property which had been levied on was put in the hands of a receiver who sold it, the amount recoverable on the bond after the dissolution of the injunction was the difference between the amount actually obtained by the receiver and what would have been realized on a sale by the officer.[208]

It is usually held that interest on the amount of money tied up by the injunction may be recovered in an action on the bond;[209] though in a few cases it is held that interest on the amount of the debt cannot be recovered unless for some reason no interest can be recovered from the debtor upon the debt, as for instance through his insolvency,[210] or because he has paid the money into court pending the injunction.[211]

[204] Terrell *v.* Ingersoll, 10 Lea (Tenn.), 77.

[205] *United States:* Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318, 56 U. S. App. 529.

Tennessee: Terrell *v.* Ingersoll, 10 Lea, 77.

[206] *Alabama:* Ansley *v.* Mock, 8 Ala. 444.

Tennessee: Terrell *v.* Ingersoll, 10 Lea, 77.

[207] *Illinois:* Walker *v.* Pritchard, 135 Ill. 103, 35 N. E. 573, 11 L. R. A. 577.

Nebraska: Stull *v.* Beddeo, 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507.

[208] Dodge *v.* Cohen, 14 D. C. App. 582.

[209] *California:* Heyman *v.* Landers, 12 Cal. 107.

District of Columbia: Dodge *v.* Cohen, 14 D. C. App. 582. In Grundy *v.* Young, 11 Fed. Cas. No. 5,851, 2 Cranch C. C. 114, it was held that interest could not be recovered as damages in an action on the bond after the principal had been paid.

Illinois: Boynton Strong Co. *v.* Williams, 57 Ill. App. 434.

Maryland: Gist *v.* M'Guire, 4 Har. & J. 9; Wallis *v.* Dilley, 7 Md. 237.

Mississippi: Weatherby *v.* Shackleford, 37 Miss. 559.

Tennessee: Staples *v.* White, 88 Tenn. 30.

Texas: Attoway *v.* Still, 2 Tex. Unrep. 697.

Virginia: Washington *v.* Park, 6 Leigh, 581.

In Richards *v.* Green, 3 Ariz. 227, 32 Pac. 266, recovery of interest was refused, but the decision turned on the form of the pleadings.

[210] *New Hampshire:* Derry Bank *v.* Heath, 45 N. H. 524.

South Carolina: Gadsden *v.* Georgetown Bank, 5 Rich. 336.

[211] Bullock *v.* Ferguson, 30 Ala. 227.

When during the pendency of the injunction the value in gold of legal tender notes depreciated, it was held that the amount of the depreciation could not be recovered in an action on the bond, since the amount legally due, that is, the amount of the debt in legal tender, had not been changed.[212]

§ 685h. Injunctions against a sale.

Where the injunction prevented the sale of property, the plaintiff may recover in an action on the bond, the depreciation in the value of the property between the time of obtaining the injunction and the time of its dissolution.[213] If the property was lost or destroyed pending the injunction, its value may be recovered;[214] and if it was sold at a loss as perishable the amount of such loss may be recovered.[215]

Where the sale enjoined was an execution sale or a foreclosure sale, no damages may be recovered for loss of use of the property, since the seller was not entitled to the beneficial use of the property unless he bid it in at the sale, and it cannot be proved that he would have bid it in;[216] nor upon depreciation in value, if the security is still sufficient.[217] Interest may, however, be recovered on the money which the plaintiff would

[212] Riddlesbarger *v.* McDaniel, 38 Mo. 138.

[213] *Colorado:* Slack *v.* Stephens, 19 Colo. App. 538, 76 Pac. 741 (shares of stock).

Illinois: Sturges *v.* Hart, 45 Ill. 103 (law); Brandamour *v.* Trant, 45 Ill. 372.

Iowa: Langworthy *v.* McKelvey, 25 Ia. 48 (security).

Louisiana: Lallande *v.* Trezevant, 39 La. Ann. 830, 2 So. 573 (animals injured by bad treatment).

Maryland: Levy *v.* Taylor, 24 Md. 282.

Mississippi: Rubon *v.* Stephan, 25 Miss. 253.

Missouri: Meysenburg *v.* Schlieper, 48 Mo. 426.

The difference in the value of paper money reckoned in gold coin, cannot be recovered since the amount in legal tender is the same. Riddlesbarger *v.* McDaniel, 38 Mo. 138.

[214] *New York:* Aldrich *v.* Reynolds, 1 Barb. Ch. 613 (crops removed).

Washington: White *v.* Brooke, 11 Wash. 99, 39 Pac. 237 (chattels sold on foreclosure of subsequent mortgage and removed).

[215] Rhodes *v.* Auld, 5 Kan. App. 225, 47 Pac. 170.

[216] Execution sale: Johnson *v.* Moser, 72 Ia. 654, 34 N. W. 459; Colby *v.* Meservey, 85 Ia. 555, 52 N. W. 499.

Foreclosure sale: Schening *v.* Cofer, 97 Ala. 726, 12 So. 414 (in absence of evidence that on sale there would have been a deficiency which rent might have been taken to make up); Curry *v.* American F. L. M. Co., 124 Ala. 614, 27 So. 454, 82 Am. St. Rep. 311.

[217] Fidelity & Deposit Co. *v.* Walker, 158 Ala. 129, 48 So. 600.

have received from the sale, since he has been kept out of the money.[218]

Consequential damages may be recovered in a proper case. Loss of an advantageous sale may be recovered if it can be proved with reasonable certainty that the sale would have taken place; [219] but not where the sale was not prevented by the injunction itself,[220] but by the cloud which the suit threw upon the title.[221] The plaintiff may recover the amount spent for advertising the sale,[222] and the cost of storing and insuring the goods by the sheriff pending the injunction against an execution sale.[223] Profits which the plaintiff expected to realize from the use of the purchase-money are too speculative,[224] and the plaintiff cannot be called upon to enter into a speculation to reduce damages.[225]

The amount of the plaintiff's claim cannot be recovered,[226] but only the loss actually proved.[227]

§ 685i. Injunctions against other acts.

Where the injunction restrained the taking possession of

[218] *Iowa:* Johnson *v.* Moser, 72 Iowa, 654, 34 N. W. 459 (execution sale).

Maryland: Wood *v.* Fulton, 2 H. & G. 71 (foreclosure sale).

New York: Aldrich *v.* Reynolds, 1 Barb. Ch. 613 (foreclosure sale).

South Carolina: Hill *v.* Thomas, 19 S. C. 230.

Where the mortgage debt was payable in instalments, the recovery is confined to interest on the instalments due at the time of the injunction. Cannon *v.* Labarre, 13 La. 399.

[219] *District of Columbia:* Kerngood *v.* Gusdorf, 5 Mack. 161 (expected average sale of stock of goods).

Illinois: Sturges *v.* Hart, 45 Ill. 103 (*bona fide* offer had been made).

Contra, Washington: Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322 (*bona fide* offer).

[220] Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

[221] Sweet *v.* Mowry, 71 Hun, 381, 25 N. Y. Supp. 32.

[222] *Illinois:* Edwards *v.* Pope, 4 Ill. 465.

Missouri: Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793.

New York: Willet *v.* Scovill, 4 Abb. Pr. 405.

[223] Fox *v.* Oriel Cabinet Co., 70 Ill. App. 322.

[224] Elms *v.* Wright-Blodgett Co., 106 La. 19, 30 So. 315.

[225] O'Connor *v.* New York, etc., Land Imp. Co., 8 Misc. 243, 28 N. Y. Supp. 544.

[226] Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793; unless as in Lockwood *v.* Saffold, 1 Ga. 72, the bond called for the payment of the debt.

[227] *Colorado:* Belmont Mining & Milling Co. *v.* Costigan, 21 Colo. 465, 42 Pac. 650, 52 Am. St. Rep. 254.

Kentucky: Hord *v.* Trimble, 1 Litt. 413.

property, which was destroyed by the possessor pending the injunction, it has been held that the value of the property may be recovered in an action on the bond.[228] On an injunction against removing negroes, the hire of the negroes may be recovered in an action on the bond together with compensation for any injury done them by taking them away; but loss of expected crops for lack of their services is not recoverable, unless the crops were then ready for harvest.[229] On a bond given in connection with an injunction against the use of a machine in manufacturing it seems that the plaintiff may recover the increased cost of manufacture due to his not having the machine.[230] Where the injunction restrained the city from issuing or disposing of its municipal bonds for the purpose of erecting an electric lighting plant, damages were allowed for the depreciation in the price at which its bonds could be sold during the delay, but not for the increased price which it was obliged to pay for machinery.[231] In case of an injunction against paying money, the party entitled to receive it can recover interest on the amount while payment was delayed.[232]

§ 685j. Counsel fees incurred on account of the injunction.

All counsel fees which resulted from the granting of the preliminary injunction may be recovered, and these include at least the fees incurred for a successful motion to dissolve the injunction, before a hearing on the merits.[233]

[228] Barton *v.* Fisk, 30 N. Y. 166; *contra,* Cummings *v.* Mugge, 94 Ill. 186.

[229] McDaniel *v.* Crabtree, 21 Ark. 431.

[230] San Jose Fruit Packing Co. *v.* Cutting, 133 Cal. 237, 65 Pac. 565.

[231] Clay Center *v.* Williamson, 79 Kan. 485, 100 Pac. 59.

[232] *Missouri:* C. H. Albers C. Co. *v.* Spencer, 139 S. W. 321 (against paying out money deposited).

Tennessee: Heck *v.* Bulkley, 1 S. W. 612 (against paying a dividend).

[233] *Alabama:* Holmes *v.* Weaver, 52 Ala. 516; Bolling *v.* Tate, 65 Ala. 417, 39 Am. Rep. 5, (including fees in the Supreme Court made necessary by the injunction).

Georgia: Richardson *v.* Allen, 74 Ga. 719.

Illinois: Elder *v.* Sabin, 66 Ill. 126; Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692, 68 Ill. App. 623; Marks *v.* Chicago Yacht Club, 121 Ill. App. 308; Kerz *v.* Wold, 131 Ill. App. 387; Fordham *v.* Thompson, 144 Ill. App. 342.

Indiana: Binford *v.* Grimes, 26 Ind. App. 481, 59 N. E. 1085.

Kentucky: Fidelity & D. Co. *v.* Tinsley, 100 S. W. 272, 30 Ky. L. R. 1095.

Louisiana: Pargoud *v.* Morgan, 2 La. 99; Gamard *v.* Hart, 4 La. Ann. 503.

Minnesota: Neilson *v.* Albert Lea, 87 Minn. 285, 91 N. W. 1113.

Mississippi: Allen *v.* Leflore County, 80 Miss. 298, 31 So. 815.

In the Federal courts, according to the doctrine there prevailing, counsel fees cannot be recovered in an action on the bond, even if they are fees for securing a dissolution of the injunction; and this doctrine is applied to all actions on bonds given in the Federal courts, even though action on the bond is originally brought in the State court.[234] And in a few States it is held that no counsel fees can in any case be recovered in an action on the bond.[235]

Where an appeal is taken from the order on the motion for dissolution, and the temporary injunction is finally dissolved

Missouri: Wabash R. R. *v.* McCabe, 118 Mo. 640, 24 S. W. 217 (distinguishing earlier cases as based on a different and unusual statute); Helmkampf *v.* Wood, 85 Mo. App. 227.

Montana: Helena *v.* Brule, 15 Mont. 429, 39 Pac. 456, 852; Montgomery *v.* Gilbert, 24 Mont. 121, 60 Pac. 1038.

Nebraska: Carnes *v.* Heimrod, 45 Neb. 364, 63 N. W. 809 (a distinction was made in this respect between an undertaking given on a temporary restraining order and a bond on an injunction); Gyger *v.* Courtney, 59 Neb. 555, 81 N. W. 437; Jameson *v.* Bartlett, 63 Neb. 638, 88 N. W. 860.

New Jersey: Cook *v.* Chapman, 41 N. J. Eq. 152.

New York: Rose *v.* Post, 56 N. Y. 603; Sargent *v.* St. Mary's O. B. Asylum, 190 N. Y. 394, 83 N. E. 38; Fitzpatrick *v.* Flagg, 12 Abb. Pr. 189; Aldrich *v.* Reynolds, 1 Barb. Ch. 613; Coates *v.* Coates, 1 Duer, 664; London & B. Bank *v.* Walker, 74 Hun, 395, 26 N. Y. Supp. 844; Ten Eyck *v.* Sayers, 76 Hun, 37, 27 N. Y. Supp. 588; Edwards *v.* Bodine, 11 Paige, 223.

Ohio: Noble *v.* Arnold, 23 Oh. St. 264.

Washington: Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

West Virginia: State *v.* Medford, 34 W. Va. 633, 12 S. E. 864; State *v.* Corwin, 51 W. Va. 19, 41 S. E. 211.

Wisconsin: Wisconsin M. & F. I. Co. Bank *v.* Durner, 114 Wis. 369, 90 N. W. 435.

Such fees may be recovered even though the court which granted the injunction was without jurisdiction. Littleton *v.* Burgess, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N. S.) 49.

[234] *United States:* Tullock *v.* Mulvane, 184 U. S. 497, 22 Sup. 372, 46 L. ed. 657 (reversing Mulvane *v.* Tullock, 58 Kan. 622, 50 Pac. 897); Missouri, K. & T. Ry. *v.* Elliott, 184 U. S. 530, 22 Sup. Ct. 447, 46 L. ed. 673 (reversing Elliott *v.* Missouri, K. & T. Ry., 77 Mo. App. 652); Browning *v.* Porter, 12 Fed. 460, 2 McCrary, 581; Lindeberg *v.* Howard, 146 Fed. 467, 77 C. C. A. 23; Sullivan *v.* Cartier, 147 Fed. 222, 77 C. C. A. 448.

Arizona: Richards *v.* Green, 3 Ariz. 227, 32 Pac. 266.

New York: National Society of U. S. Daughters of 1812 *v.* American Surety Co., 107 N. Y. Supp. 820, 56 Misc. 627.

[235] *Mississippi:* Canadian & A. M. & T. Co. *v.* Fitzpatrick, 71 Miss. 347, 16 So. 877 (statutory).

Oklahoma: Revell *v.* Smith, 25 Okla. 508, 106 Pac. 863 (bond given in Indian Territory, where Arkansas law prevailed, which did not allow counsel fees).

Tennessee: Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.

on appeal, counsel fees on the appeal as well as on the original motion may be recovered.[236]

Where the injunction is the final relief asked in the suit, it is held in several jurisdictions that counsel fees incurred on the hearing may be recovered, on the ground that the question whether the temporary injunction shall be dissolved involves a trial of the whole case.[237] But in other jurisdictions it is held that in such a case no counsel fees can be recovered, since the legal services necessary to secure a final decree for the defendant were not in any way increased by the granting of the temporary injunction.[238]

§ 685k. Counsel fees in the entire litigation.

Since the bond secures the payment of the damages caused by the issuance of the injunction only, and not those caused by the entire litigation in the course of which the injunction is issued, the counsel fees incurred in the general course of the litigation cannot be recovered in an action on the bond, at least where the injunction is not the principal relief sought, but merely ancillary to the principal relief,[239] since in such a case

[236] *Alabama:* Cooper *v.* Hames, 93 Ala. 280, 9 So. 341; Jesse French Piano & Organ Co. *v.* Porter, 134 Ala. 302, 32 So. 67, 92 Am. St. Rep. 31.

Missouri: Lewis *v.* Leahey, 14 Mo. App. 564.

Contra, New York: Guilford *v.* Cornell, 4 Abb. Pr. 220.

[237] *Iowa:* Colby *v.* Meservey, 85 Ia. 555, 52 N. W. 499; Williams *v.* Ballinger, 125 Ia. 410, 101 N. W. 139.

In *Louisiana:* Elms *v.* Wright-Blodgett Co., 106 La. 19, 30 So. 315, it is said that the recovery of counsel fees in such case depends upon the particular facts of the case.

Mississippi: Jameson *v.* Dulaney, 74 Miss. 890, 21 So. 972.

Missouri: Holloway *v.* Holloway, 103 Mo. 274, 15 S. W. 536.

Ohio: Dwelle *v.* Wilson, 14 Ohio Cir. Ct. 551, 7 Ohio Cir. Dec. 611.

[238] *Alabama:* Bush *v.* Kirkbride, 131 Ala. 405, 30 So. 780.

California: San Diego Water Co *v.* Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651.

Kentucky: New National Turnpike Co. *v.* Dulaney, 86 Ky. 516, 6 S. W. 590, 9 Ky. L. Rep. 697; Chicago S. L. & N. O. R. R. *v.* Sullivan, 26 Ky. L. Rep. 46, 80 S. W. 791; Shepherd *v.* Gambill, 96 S. W. 1104, 29 Ky. L. Rep. 1163.

Oregon: Olds *v.* Cary, 13 Ore. 362, 10 Pac. 786.

[239] *Alabama:* Robertson *v.* Robertson, 58 Ala. 68.

California: Porter *v.* Hopkins, 63 Cal. 324; San Diego Water Co. *v.* Pacific C. S. S. Co., 101 Cal. 216, 35 Pac. 651.

Colorado: Tabor *v.* Clark, 15 Colo. 434, 25 Pac. 181; Baldwin S. C. Co. *v.* Quinn, 46 Colo. 590, 105 Pac. 1101.

Illinois: Landis *v.* Wolf, 206 Ill. 392, 69 N. E. 103; McQuown *v.* Law, 18 Ill. App. 34; Dunning *v.* Young, 67 Ill. App. 668.

all such fees would have been paid if the temporary injunction had never issued.[240] On this ground counsel fees paid for resisting the motion for a temporary injunction are not recoverable in an action on the bond, since they were not caused by the issuance of the injunction, but would have been the same even though it had been refused.[241] If it is impossible to show what portion of an entire fee for the services of counsel was paid on account of the motion to dissolve and what portion is ascribed to the defence of the whole action, nothing can be

Iowa: Bullard *v.* Harkness, 83 Ia. 373, 49 N. W. 855; Ady *v.* Freeman, 90 Ia. 402, 57 N. W. 879; Leonard *v.* Capital Ins. Co., 101 Ia. 482, 70 N. W. 629.

Kentucky: Thapnell *v.* McAfee, 3 Met. 34, 77 Am. Dec. 152; Green *v.* Quisenberry, 118 S. W. 361.

Louisiana: Lemeunier *v.* McClearley, 41 La. Ann. 411, 6 So. 338.

Maine: Thurston *v.* Haskell, 81 Me. 303, 17 Atl. 73; Barrett *v.* Bowers, 87 Me. 185, 32 Atl. 871.

Missouri: Brown *v.* Baldwin, 121 Mo. 126, 25 S. W. 863; Louisville Banking Co. *v.* M. V. Monarch Co., 68 Mo. App. 603.

Nebraska: Trester *v.* Pike, 60 Neb. 510, 83 N. W. 676; Darling *v.* McBride, 86 Neb. 481, 125 N. W. 1088.

New York: Newton *v.* Russell, 87 N. Y. 527; Strong *v.* De Forest, 15 Abb. Pr. 427; Allen *v.* Brown, 5 Lans. 511; McDonald *v.* James, 38 N. Y. Super. Ct. 76, 47 How. Pr. 474; Whiteside *v.* Cottage Assoc., 64 Hun, 557, 32 N. Y. Supp. 725; Phœnix B. Co. *v.* Keystone B. Co., 10 App. Div. 176, 41 N. Y. Supp. 891.

Ohio: Riddle *v.* Cheadle, 25 Oh. St. 278; Tarbell *v.* Ennis, 10 Ohio S. & C. Pl. Dec. 346, 7 Ohio N. P. 416.

South Carolina: Gadsden *v.* Georgetown Bank, 5 Rich. 336; Darlington *v.* Copeland, 43 S. C. 389, 21 S. E. 317.

Texas: Brown *v.* Tyler, 34 Tex. 168.

Virginia: Wisecarver *v.* Wisecarver, 97 Va. 452, 34 S. E. 56.

Washington: Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322; Anderson *v.* Philadelphia P. L. Co., 26 Wash. 192, 66 Pac. 415; Collins *v.* Huffman, 48 Wash. 184, 93 Pac. 220.

West Virginia: State *v.* Taylor, 68 S. E. 379.

In *Montana*, Miles *v.* Edwards, 6 Mont. 180, 9 Pac. 814, it was held that plaintiff could recover the attorney's fees for dissolving the temporary order and also fees for resisting a final injunction even though the attorney's services were rendered after the time when the temporary injunction expired.

On an injunction bond given in an action to restrain a suit at law, counsel fees incurred in the action restrained cannot be recovered. Allport *v.* Kelby, 2 Mont. 343.

[240] *Minnesota:* Lamb *v.* Shaw, 43 Minn. 507, 45 N. W. 1134.

Ohio: Riddle *v.* Cheadle, 25 Oh. St. 278.

[241] *California:* Alaska Imp. Co. *v.* Hirsch, 119 Cal. 251, 47 Pac. 124.

Colorado: Quinn *v.* Silka, 19 Colo. App. 507, 76 Pac. 555.

New York: Youngs *v.* McDonald, 56 App. Div. 14, 67 N. Y. Supp. 375 (affirmed, 166 N. Y. 639, 60 N. E. 1123); Whiteside *v.* Assoc., 84 Hun, 555, 32 N. Y. Supp. 724.

Vermont: Sturges *v.* Knapp, 33 Vt. 486.

Contra, Indiana: Swan *v.* Timmons, 81 Ind. 243; Robertson *v.* Smith, 129 Ind. 422, 28 N. E. 587, 15 L. R. A. 273.

recovered on the bond.[242] So where a gross fee was agreed upon for the whole litigation nothing can be recovered on the bond,[243] and where the plaintiff on the bond was a city and the services were performed by the city attorney, who was paid an annual salary, nothing can be recovered on account of attorney's fees;[244] but if he reasonably employed assistant counsel for the purpose of securing an injunction, the cost may be recovered.[245]

§ 6851. Counsel fees not chargeable to defendant.

Counsel fees which are recoverable on the bond do not include the expense of an unsuccessful attempt to secure a dissolution of the injunction, even though on the final hearing it was dissolved; apparently because it is regarded as the fault of the party or his counsel that the dissolution was not obtained.[246] If, however, the court itself continues the injunction not because it so decides upon the merits as the motion presents them, but because it deems it desirable not to consider the merits of the preliminary injunction until hearing, the costs of the motion may be recovered.[247] But when the injunction is not dissolved by the court, but is superseded or modified by

[242] *Colorado:* Church *v.* Baker, 18 Colo. App. 369, 71 Pac. 888.

Illinois: Lambert *v.* Alcorn, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611.

Kentucky: Boyd *v.* Chambers, 9 Ky. L. R. 56.

Montana: Campbell *v.* Metcalf, 1 Mont. 378; Creek *v.* McManus, 17 Mont. 445, 43 Pac. 497.

South Carolina: Hill *v.* Thomas, 19 S. C. 230; Darlington *v.* Copeland, 43 S. C. 389, 21 S. E. 317.

But in Jesse French P. & O. Co. *v.* Porter, 134 Ala. 302, 32 So. 67, it seems to have been held that such portion of the whole fee as is reasonable for the services in securing dissolution could be recovered. And see Hyatt *v.* Washington, 20 Ind. App. 148, 50 N. E. 402, 67 Am. St. Rep. 248.

[243] Bustamente *v.* Stewart, 55 Cal. 115; Mitchell *v.* Hawley, 79 Cal. 301, 21 Pac. 833.

[244] *Illinois:* Kerz *v.* Wold, 131 Ill. App. 387; Fordham *v.* Thompson, 144 Ill. 342.

Mississippi: Nixon *v.* Biloxi, 76 Miss. 810, 25 So. 664.

[245] Fordham *v.* Thompson, 144 Ill. App. 342.

[246] *California:* Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111.

Minnesota: Lamb *v.* Shaw, 43 Minn. 507, 45 N. W. 1134.

Nebraska: Pollock *v.* Whipple, 57 Neb. 82, 77 N. W. 355; Cunningham *v.* Finch, 63 Neb. 189, 88 N. W. 168.

New York: Randall *v.* Carpenter, 88 N. Y. 293; Langdon *v.* Gray, 22 Hun, 511; Childs *v.* Lyons, 3 Rob. 704.

[247] Andrews *v.* Glenville Woolen Co., 50 N. Y. 282.

agreement of the parties, no counsel fees can be recovered.[248] And if the injunction is not dissolved but modified the whole fee at least cannot be recovered.[249] Where the injunction did no harm so that a motion for a dissolution was needless, it would seem that the expense of such an unnecessary motion could not be recovered on the bond.[250] And no counsel fees can be recovered which were incurred in defending plaintiff from an attachment for contempt for violating the injunction, since it was the fault of the plaintiff himself.[251]

§ 685m. Amount of counsel fees recoverable—Exorbitant charges.

The amount recovered cannot exceed a reasonable amount,[252] and must not be swelled by unnecessarily employing several counsel.[253] Exorbitant charges cannot be allowed; and it seems that where the defendant is himself a lawyer and acts as counsel for himself, he can recover nothing on this ground, as it costs him nothing.[254] If there was no agreement upon the amount of the fee, a reasonable amount may be recovered;[255] but if there was an agreement upon the amount, no more can be recovered.[256] Where counsel fees were paid in the original suit, as where after dissolution of an injunction against a fore-

[248] *Iowa:* Ady *v.* Freeman, 90 Ia. 402, 57 N. W. 879.

Vermont: Barre Water Co. *v.* Carnes, 68 Vt. 23, 33 Atl. 898.

Contra, Alabama: Jackson *v.* Millspaugh, 100 Ala. 285, 14 So. 44, where it was continued by agreement.

[249] Ford *v.* Loomis, 62 Ia. 586, 16 N. W. 193, 17 N. W. 910. The court intimated that part of the fee might perhaps be recovered.

[250] *Colorado:* Grove *v.* Wallace, 11 Colo. App. 160, 52 Pac. 639.

Mississippi: Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

Contra, Alabama: Rosser *v.* Timberlake, 78 Ala. 162, on the ground that it does not lie in the mouth of the defendant to say that the injunction obtained by him was of no detriment to the other party.

[251] Bennett *v.* Lambert, 100 Ky. 737, 39 S. W. 419, 18 Ky. L. Rep. 1057, 66 Am. St. Rep. 370.

[252] *Alabama:* Jesse French P. & O. Co. *v.* Porter, 134 Ala. 302, 32 So. 67, 92 Am. St. Rep. 31.

Florida: Wittich *v.* O'Neal, 22 Fla. 592.

[253] Collins *v.* Sinclair, 51 Ill. 328.

[254] Jevne *v.* Osgood, 57 Ill. 340, 347; Stinnett *v.* Wilson, 19 Ill. App. 38.

[255] *Florida:* Wittich *v.* O'Neal, 22 Fla. 592.

Kansas: Nimocks *v.* Welles, 42 Kan. 39, 21 Pac. 787.

Montana: Cook *v.* Greenough, 14 Mont. 352, 36 Pac. 35.

West Virginia: State *v.* Medford, 34 W. Va. 633, 12 S. E. 864.

[256] Steele *v.* Thatcher, 56 Ill. 257; Lomax *v.* Ragor, 85 Ill. App. 679.

closure sale the sale took place and counsel fees were paid out of the proceeds as part of the costs, they could not again be recovered on the bond.[257] In California it is held that liability to pay the fees is not sufficient to justify recovery; no compensation being allowed on that ground unless the fees have actually been paid.[258] But in other jurisdictions a different view is taken, and it is held that if the liability has been incurred there may be a recovery of the amount of it, though it is as yet unpaid.[259] A party personally liable for the fees may recover though he was acting in a representative capacity,[260] or was only one of several parties.[261]

§ 685n. Other expenses of litigation.

Other necessary expenses of the motion to dissolve the injunction may be recovered; such as the value of the party's time lost in consulting counsel or attending the hearing;[262] and his personal expenses,[263] including his travelling expenses.[264]

[257] Curry *v.* American Freehold Land Mortg. Co., 124 Ala. 614, 27 So. 454, 82 Am. St. Rep. 211.

[258] Wilson *v.* McEvoy, 25 Cal. 170; Prader *v.* Grimm, 28 Cal. 11; Roussin *v.* Stewart, 33 Cal. 208; Bustamente *v.* Stewart, 55 Cal. 115; Hooper *v.* Patterson (Cal.), 32 Pac. 514.

In Corder *v.* Martin, 17 Mo. 41, the same doctrine was asserted.

[259] *Alabama:* Miller *v.* Garrett, 35 Ala. 96.

Florida: Wittich *v.* O'Neal, 22 Fla. 592.

Illinois: Steele *v.* Thatcher, 56 Ill. 257; Rees *v.* Peltzer, 1 Ill. App. 315; Patterson *v.* Rinard, 81 Ill. App. 80.

Kansas: Underhill *v.* Spencer, 25 Kan. 71.

Kentucky: Shultz *v.* Morrison, 3 Met. 98.

Louisiana: McRae *v.* Brown, 12 La. Ann. 181; Meaux *v.* Pittman, 35 La. Ann. 360.

Nevada: Brown *v.* Jones, 5 Nev. 374.

Ohio: Noble *v.* Arnold, 23 Oh. St. 264.

[260] Baylis *v.* Scudder, 6 Hun (N. Y.), 300.

[261] Babcock *v.* Reeves, 149 Ala. 665, 43 So. 21.

[262] *Missouri:* Skrainka *v.* Oertel, 14 Mo. App. 474; Helmkampf *v.* Wood, 85 Mo. App. 227.

Montana: Campbell *v.* Metcalf, 1 Mont. 378.

New York: Edwards *v.* Bodine, 11 Paige, 223.

Contra, Illinois: Densch *v.* Scott, 58 Ill. App. 33 (time at court and procuring witnesses).

New Jersey: Cook *v.* Chapman, 41 N. J. Eq. 152.

[263] *Illinois:* Tamatroa *v.* Southern Ill. Normal University, 54 Ill. 334.

Missouri: Wabash R. R. *v.* McCabe, 118 Mo. 640, 24 S. W. 217.

New York: Lyon *v.* Hersey, 32 Hun, 253.

[264] *Alabama:* Bolling *v.* Tate, 65 Ala. 417, 39 Am. Rep. 5.

New York: Crounse *v.* Syracuse & R. R. R., 32 Hun, 497 (special train).

§ 685o. Bonds for vacating injunction.

When a temporary injunction is vacated or modified upon a bond being given by the defendant, the plaintiff in an action on the bond recovers the loss to him caused by the defendant doing the act enjoined after the injunction was so modified or vacated as to allow it.[265] So where the defendant, the owner of a controlling interest in the stock of a corporation, was enjoined at suit of a stockholder from removing property of the corporation from the State, and after the injunction was vacated he removed the property the measure of damages was not the value of the property, removed, but the diminution in value of the plaintiff's stock caused by the removal.[266]

§ 686. Bail bonds.

In an action upon a bail bond in a civil suit given to the sheriff to secure the release of a debtor, the measure of damages is the amount of the judgment upon the debt,[267] but the defendant may show that at the time of the breach the debtor was insolvent.[268] In a suit upon a poor debtor's bond, the damages will be the amount of the judgment and the costs of the action in which it was given, with the interest thereon.[269] The same is the measure on a prison-bounds' bond,[270] and a voluntary return by the prisoner will not mitigate the damages.[271] In an

[265] De Camp *v.* Burns, 33 App. Div. 517, 53 N. Y. Supp. 1035.

[266] Moulton *v.* Richardson, 49 N. H. 76.

[267] *Arkansas:* Leach *v.* Pirani, 5 Ark. 118.

Connecticut: New Haven Bank *v.* Miles, 5 Conn. 587.

Illinois: Murphy *v.* Sommerville, 7 Ill. 360, 43 Am. Dec. 58.

[268] *Maine:* Sargent *v.* Pomroy, 33 Me. 388.

New York: Kellogg *v.* Manro, 9 Johns. 300.

Canada: Brown *v.* Paxton, 19 Up. Can. Q. B. 426.

Contra, Connecticut: Hall *v.* White, 27 Conn. 488.

Indiana: Rooksby *v.* State, 92 Ind. 71.

Canada: Kerr *v.* Fullarton, 10 Up. Can. C. P. 250; M'Kenzie *v.* Marsh, 2 Kerr (N. B.), 629.

[269] *Maine:* Richards *v.* Morse, 36 Me. 240; Houghton *v.* Lyford, 39 Me. 267; Call *v.* Foster, 52 Me. 257.

Ohio: Laines *v.* Philips, 4 Ohio, 172.

Insolvency of the debtor cannot be shown in mitigation of damages. Kiersted *v.* State, 1 Gill & J. (Md). 231.

[270] *New York:* Smith *v.* Jansen, 8 Johns. 111; Sprague *v.* Seymour, 15 Johns. 474.

Virginia: McGuire *v.* Pierce, 9 Gratt. 167.

[271] *Connecticut:* Seymour *v.* Harvey, 8 Conn. 63.

Indiana: Spader *v.* Frost, 4 Blackf. 190.

New York: Flynn *v.* Union S. & G.

action upon a bail bond in a criminal proceeding the penalty may be recovered,[272] but without interest.[273]

§ 686a. Bonds for arrest.

When a bond is given to secure the arrest of a person he may recover on the bond only such special damages as he can prove; which do not include any damages which would have been suffered if the action had been begun without an arrest.[274] Compensation may be recovered for counsel fees and other expenses incurred in securing discharge from the arrest, and for loss of time, but not for the personal injury and false imprisonment.[275]

§ 687. Arbitration bonds.

In an action upon a bond to abide the award of arbitrators, the measure of damages is the amount of the award, if a pecuniary award was made,[276] even though the authority of the arbitrators was revoked by the defendant, one of two debtors, after the testimony was in and pending the decision.[277] Where the award required security to be given at once, and the money paid in instalments, the plaintiff upon a failure to give security, may at once recover the whole amount of the award.[278] When the bond was to abide an award as to a disputed boundary line, it was held that the plaintiff could recover the expenses incurred in defending a suit in equity brought by the defendant to set aside the award.[279] In such a case, the damages recoverable for violation of the award are such only as are personal to the party.[280]

Co., 61 App. Div. 170, 70 N. Y. Supp. 403.

[272] Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929.

[273] United States *v.* Broadhead, 127 U. S. 212, 8 Sup. Ct. 1191, 32 L. ed. 147; *contra*, Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929.

[274] Wallis *v.* Keeney, 88 Ill. 370.

[275] Bamberger *v.* Kahn, 43 Hun (N. Y.), 411; Krause *v.* Rutherford, 45 App. Div. 132, 60 N. Y. Supp. 1047. But in Vanderberg *v.* Connoly, 18 Utah, 112, 54 Pac. 1097, the plaintiff was allowed in an action on the bond to recover damages for mental and physical suffering caused by the arrest and imprisonment, and attorneys' fees in procuring the discharge.

[276] *Delaware:* Stewart *v.* Grier, 7 Houst. 378, 32 Atl. 328.

Indiana: Shroyer *v.* Bash, 57 Ind. 349, 26 Am. Rep. 57.

[277] Hatheway *v.* Cliff, 2 All. (N. B.) 267.

[278] Bond *v.* Bond, 16 Up. Can. C. P. 327.

[279] Henry *v.* Davis, 123 Mass. 345.

[280] Webb *v.* Fish, 4 N. J. L. 371.

In New York, when there is a revocation of the submission, damages are limited by statute to costs and expenses, and all damages incurred in preparing for the arbitration, and in conducting the proceedings to the time of revocation.[281]

§ 688. Appeal and supersedeas bonds.

The appeal or supersedeas bond in the United States courts and in several of the states binds the obligors to pay the amount of the judgment, up to the penalty of the bond; [282] while in other States the amount of the judgment itself cannot be recovered in an action on the bond.[283] If the amount of the judgment is ordinarily recoverable, nominal damages only can be recovered when the judgment has in fact been paid, even though there has been a technical breach of the bond; [284] and so where for any other reason the appellant has nothing to pay on the

[281] Code Civ. Pro., § 2384; Allen *v.* Watson, 16 John. 204; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633, 52 N. E. 671.

[282] *United States:* Sessions *v.* Pintard, 18 How. 106, 15 L. ed. 298; Tarr *v.* Rosenstein, 53 Fed. 112, 3 C. C. A. 466; Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474.

Colorado: Dye *v.* Dye, 12 Colo. App. 206, 55 Pac. 205.

Florida: Raney *v.* Baron, 1 Fla. 327, 46 Am. Dec. 346.

Illinois: Stelle *v.* Lovejoy, 125 Ill. 352.

Indiana: Opp *v.* Ten Eyck, 99 Ind. 345.

Michigan: Healy *v.* Newton, 96 Mich. 228, 55 N. W. 666.

New York: Donovan *v.* Clark, 76 Hun, 339, 27 N. Y. Supp. 686.

Virginia: McClung *v.* Beirne, 10 Leigh, 410, 34 Am. Dec. 739.

Of course this is true only in case of a money judgment; in case of a non-pecuniary judgment there is no amount to recover. So on appeal from a decree of foreclosure of a mortgage of land the amount of the mortgage debt cannot be recovered on the bond.

United States: Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486.

Kentucky: Graham *v.* Swigert, 12 B. Mon. 522.

If the judgment is partly for the payment of money recovery may be had on the bond for that portion of the judgment. Rice *v.* Rice, 13 Ind. 562.

The recovery is limited to the penalty of the bond, though by mistake that is too small. Sears *v.* Seattle Consolidated St. R. R., 7 Wash. 286, 34 Pac. 918.

[283] *Maryland:* Keen *v.* Whittington, 40 Md. 489.

Tennessee: Smith *v.* Erwin, 5 Yerg. 296.

In New York the bond is conditioned on paying the damages of appeal, which means the sum awarded as damages in the appellate court. Post *v.* Doremus, 60 N. Y. 371; Onderdonk *v.* Emmons, 9 Abb. Pr. 187.

[284] *Illinois:* George *v.* Bischoff, 68 Ill. 236.

Massachusetts: Brennan *v.* Quinn, 148 Mass. 562, 20 N. E. 184.

Minnesota: First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239.

judgment.[285] Costs on the appeal are recoverable on the bond,[286] though not usually costs in the original action; [287] so are counsel fees on appeal.[288]

Where an appeal is taken to an intermediate court and a bond given, and a second appeal is then taken to a higher court and a second bond given, the execution of the second bond does not, by the better opinion, release the parties to the first bond from liability on it for the entire loss caused by both appeals.[289] In New York, however, this is not always true. If the judgment is reversed in the intermediate court, and on a second appeal the original judgment is restored, the parties to the first bond are bound for the loss caused by both appeals; [290] but if the judgment is affirmed successively in both courts, the execution of the second bond relieves the parties to the first bond from liability to further damages, to the extent to which compensation is recoverable on the second bond.[291]

§ 688a. Recovery of damages from the appeal.

Besides the judgment and costs, recovery may be had on the

[285] *Alabama:* Lunsford *v.* Baskins, 6 Ala. 512 (judgment against executor; estate insolvent).

New York: Markoe *v.* American Surety Co., 44 App. Div. 285, 60 N. Y. Supp. 674 (decree payable only out of a trust fund). But in Yates *v.* Burch, 87 N. Y. 409, the sureties on the bond were held liable for the amount of the judgment, though it was against an executor, and the assets of the estate were insufficient.

[286] *Alabama:* Shows *v.* Pendry, 93 Ala. 248, 9 So. 462.

Massachusetts: Swan *v.* Picquet, 4 Pick. 465.

Michigan: Dunn *v.* Sutliff, 1 Mich. 24; Kennedy *v.* Nims, 52 Mich. 153, 17 N. W. 735.

New York: Burdett *v.* Lowe, 85 N. Y. 241.

[287] *New York:* Burdett *v.* Lowe, 85 N. Y. 241.

Tennessee: Denton *v.* Wood's Adm'r, 11 Lea, 505. See Dawson *v.* Holt, 12 Lea, 27.

Contra, Michigan: Day *v.* Litchfield, 11 Mich. 497; Prosser *v.* Whitney, 46 Mich. 405, 9 N. W. 449.

[288] Drake *v.* Webb, 63 Ala. 596; but see Swan *v.* Picquet, 4 Pick. (Mass.) 465.

[289] *Colorado:* Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61.

Illinois: Becker *v.* People, 164 Ill. 267, 45 N. E. 500.

Kentucky: Ashby *v.* Sharp, 1 Litt. 156.

Michigan: Marquette County *v.* Ward, 50 Mich. 174, 45 Am. Rep. 30.

North Carolina: State *v.* Bradshaw, 10 Ired. L. 229.

[290] Robinson *v.* Plimpton, 25 N. Y. 484; Smith *v.* Crouse, 24 Barb. 433.

[291] Hinckley *v.* Kreitz, 58 N. Y. 583; Chester *v.* Broderick, 131 N. Y. 549, 30 N. E. 507. But see Mackellar *v.* Farrell, 57 N. Y. Super. Ct. 398, 8 N. Y. Supp. 307.

appeal bond for damages suffered by the appeal.[292] Of course damages suffered prior to the appeal cannot be recovered,[293] nor damages suffered from failing to take advantage of the judgment, if the appeal did not suspend its operation.[294]

When the payment of money is delayed by the appeal, interest on the money pending the appeal may be recovered.[295] And so where a judgment for the sale of property was appealed from, the plaintiff in an action on the bond may recover interest on the amount that would have been realized.[296] And where the debtor has become insolvent, pending the appeal, the plaintiff may recover compensation for damage to his chance of collecting the debt, to be determined by proof of amount of the appellant's property from the time of the appeal to final judgment.[297]

When the judgment is for the recovery of property, the damage suffered from the temporary or permanent loss of the property may be recovered. So where a judgment for the recovery of land is appealed from, the measure of damages in an action upon the appeal bond includes the value of the use of the premises pending the appeal.[298]

[292] *United States:* Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486.

Illinois: Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626.

[293] *Illinois:* Mix *v.* Singleton, 86 Ill. 194.

New York: Rosenquest *v.* Noble, 21 App. Div. 583, 48 N. Y. Supp. 398.

[294] Shows *v.* Pendry, 93 Ala. 248, 9 So. 462.

[295] *Alabama:* Drake *v.* Webb, 63 Ala. 596.

Illinois: Nat. Bank of Ill. *v.* Baker, 58 Ill. App. 343.

Kansas: Kansas B. P. Co. *v.* United States F. & G. Co., 106 Pac. 45.

Kentucky: Bingham *v.* Vanbuskirk, 6 B. Mon. 197.

Tennessee: Gholson *v.* Brown, 4 Yerg. 198.

Contra, Vermont: Roberts *v.* Warner, 17 Vt. 46.

Where, however, the judgment superseded does not bear interest, none can be recovered on the bond. Louisville & N. R. R. *v.* Com., 89 Ky. 531, 12 S. W. 1064.

[296] *Kentucky:* Hargis *v.* Mayes, 20 Ky. L. Rep. 1965, 50 S. W. 844.

Maryland: Jenkins *v.* Hay, 28 Md. 547.

[297] *Indiana:* Roberts *v.* Lovitt, 13 Ind. App. 281, 41 N. E. 554, 55 Am. St. Rep. 224.

Kentucky: Mahlman *v.* Williams, 89 Ky. 282, 12 S. W. 335.

Minnesota: Vent *v.* Duluth Trust Co., 77 Minn. 523, 80 N. W. 640.

Texas: Trent *v.* Rhomberg, 66 Tex. 249, 18 S. W. 510.

Vermont: McGregor *v.* Balch, 17 Vt. 562.

[298] *United States:* Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. 911; Woodworth *v.* Northwestern M. L. I. Co., 185 U. S. 354, 46 L. ed. 945, 22 Sup. Ct. 676.

Where personal property has deteriorated during the appeal, the amount of the deterioration may be recovered;[299] and if real estate affected by the judgment has suffered physical deterioration or waste, though without fault on the part of the appellant, the amount of the waste may be recovered,[300] but not a decrease in value for other reasons than physical deterioration.[301] Where an order appointing a receiver of property was appealed from, and the owner sold the property pending the appeal, the value of the property at the time of the appeal is the measure of damages.[302] The plaintiff brought an action of *quo warranto* against the defendant, who had usurped an office to which the plaintiff was elected. Judgment having been

Alabama: Cahall *v.* Citizens' M. B. Assoc., 74 Ala. 539.

Illinois: Shunick *v.* Thompson, 25 Ill. App. 619.

Indiana: Opp *v.* Ten Eyck, 99 Ind. 345; Hays *v.* Wilstach, 101 Ind. 100.

Massachusetts: Braman *v.* Perry, 12 Pick. 118; Davis *v.* Alden, 2 Gray, 309.

New York: Shankland *v.* Hamilton, 1 T. & C. 239.

Ohio: Curry *v.* Homer, 62 Oh. St. 233, 56 N. E. 870.

Pennsylvania: Johnson *v.* Hessel, 134 Pa. 315, 19 Atl. 700, 19 Am. St. Rep. 700.

Utah: Tarpey *v.* Sharp, 12 Utah, 383, 43 Pac. 104.

Where it appeared that the defendant was entitled to reimbursement for valuable improvements, the recovery on the bond was limited to the value of the use of the land without the improvements. Hentig *v.* Collins, 1 Kan. App. 173, 41 Pac. 1057.

When a lease of the premises was renewed during appeal, recovery on the bond would include rent on the renewed lease as well as on the original. Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266.

The value of the use cannot be recovered on a bond given in the form required in the United States courts, if not recovered in the original action. Burgess *v.* Doble, 149 Mass. 256, 21 N. E. 438. And on any bond the peculiar form of the condition may preclude the recovery of rent. McWilliams *v.* Morgan, 70 Ill. 62.

Where the appeal stayed the sale of mortgaged premises, the rents can be recovered only if the amount finally realized on the sale is insufficient to satisfy the debt. Utica Bank *v.* Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.

[299] *United States:* Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. 911.

District of Columbia: Fulton *v.* Fletcher, 12 D. C. App. Cas. 1.

Illinois: Cook *v.* Marsh, 44 Ill. 178.

Indiana: Hinkle *v.* Holmes, 85 Ind. 405.

Kansas: Kansas B. P. Co. *v.* United States F. & G. Co., 106 Pac. 45.

Kentucky: Welch *v.* Welch, 20 Ky. L. Rep. 1990, 50 S. W. 697, 22 Ky. L. Rep. 1259, 60 S. W. 409.

[300] *Kansas:* Hughan *v.* Grimes, 62 Kan. 258, 62 Pac. 326.

Massachusetts: Davis *v.* Alden, 2 Gray, 309 (burning of building).

[301] *Kansas:* Hughan *v.* Grimes, 62 Kan. 258, 62 Pac. 326.

Kentucky: Buckner *v.* Terrell, 8 Ky. L. Rep. 701.

[302] Everett *v.* State, 28 Md. 190.

given for the plaintiff, the defendant appealed and gave bond. In an action upon the bond, after the appeal had been dismissed, it was held that the plaintiff in an action upon the bond could recover the amount of salary received by the defendant pending the appeal.[303] When the appeal delayed the crossing of the defendant's railroad by the plaintiff's railroad, the plaintiff was allowed to recover on the bond the loss of profits suffered by not being allowed to make the crossing.[304]

§ 689. Replevin bonds.

A replevin bond, given by the plaintiff in the replevin suit, is conditioned on a return of the property if the plaintiff does not maintain his claim. If his claim is abandoned for any reason and the suit discontinued without going to judgment, and the property is not returned, the condition is broken and action will lie on the bond.[305] If the case proceeds to judgment, and a judgment is rendered in favor of the defendant for a return, this judgment is conclusive in an action on the bond, against all parties to the bond, including the sureties.[306] In such a case the jury should find and the court award damages;[307] but if the jury fails to assess damages in the replevin suit, damages may nevertheless be recovered for the unlawful taking in an action on the bond.[308]

[303] *United States:* U. S. *v.* Addison, 6 Wall. 291, 18 L. ed. 919.

New York: Nichols *v.* MacLean, 101 N. Y. 526; People *v.* Nolan, 101 N. Y. 539.

[304] Waycross Air Line R. R. *v.* Offerman & W. R. R., 114 Ga. 727, 40 S. E. 738.

[305] *Kansas:* McKey *v.* Lauflin, 48 Kan. 581, 30 Pac. 16; Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025.

Maine: Pettygrove *v.* Hoyt, 11 Me. 66.

But see *Massachusetts:* Whitwell *v.* Wells, 24 Pick. 34.

If the property is redelivered, the condition is not broken and there can be no recovery on the bond. Larabee *v.* Cook, 8 Kan. App. 776, 61 Pac. 815.

Sureties are liable only when there is a judgment for a return. Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254; New England Furniture & Carpet Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974.

[306] *Indiana:* Smith *v.* Mosby, 98 Ind. 445.

Ohio: Richardson *v.* People's Nat. Bank, 57 Oh. St. 299.

Texas: Wandelohr *v.* Grayson County Nat. Bank, 102 Tex. 20, 108 S. W. 1154 (unless fraud is shown).

Vermont: Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

[307] In Vermont damages are not assessed where the plaintiff's action fails for any other reason than the merits of the case. Collamer *v.* Page, 35 Vt. 387.

[308] *United States:* Boley *v.* Griswold, 20 Wall. 486, 22 L. ed. 375.

§ 689a. Measure of recovery.

In debt on a replevin bond conditioned to pay all such damages as the defendants in the action should recover, the measure of damages is the judgment in the replevin suit.[309] But a commoner form of replevin bond is conditioned to pay the value of the property replevied. The measure of damages in a suit upon such a bond is the value of the property,[310] with interest.[311]

Colorado: Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

Connecticut: Persse *v.* Watrous, 30 Conn. 139.

Iowa: Hall *v.* Smith, 10 Ia. 45, 74 Am. Dec. 370.

Kansas: Little *v.* Bliss, 55 Kan. 94.

Maine: Washington Ice Co. *v.* Webster, 62 Me. 341.

Massachusetts: Smith *v.* Whiting, 100 Mass. 122.

Missouri: Woodburn *v.* Cogdal, 39 Mo. 222.

New Jersey: Lutes *v.* Alpaugh, 23 N. J. L. 165.

Pennsylvania: Pittsburgh Nat. Bank *v.* Hall, 107 Pa. 583.

Rhode Island: Gardiner *v.* McDermott, 12 R. I. 206.

Contra, however, in *California,* where the sureties at least are not liable on the bond for the value of the property unless it is found by the jury in the replevin suit. Clary *v.* Rolland, 24 Cal. 147.

[309] *Arkansas:* Morrill *v.* Daniel, 47 Ark. 316, 1 S. W. 702.

Indiana: M'Coy *v.* Elder, 2 Blackf. 183.

Kentucky: Kenley *v.* Commonwealth, 6 B. Mon. 583.

Maryland: Karthaus *v.* Owings, 6 H. & J. 134, 14 Am. Dec. 261.

New Hampshire: Claggett *v.* Richards, 45 N. H. 360.

Pennsylvania: Hicks *v.* McBride, 3 Phila. 377; Ingram *v.* Cox, 5 Pa. Dist. Rep. 617.

[310] *Alabama:* Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

Connecticut: Ormsbee *v.* Davis, 18 Conn. 555.

Delaware: Harmon *v.* Collins, 2 Pennew. 36, 45 Atl. 541.

Illinois: Pace *v.* Neal, 92 Ill. App. 416.

Indiana: Peffley *v.* Kenrick, 4 Ind. App. 510, 31 N. E. 40.

Indian Territory: McAlester *v.* Suchy, 1 Ind. Ty. 666, 43 S. W. 952.

Kansas: Citizens' State Bank *v.* Morse, 60 Kan. 526, 57 Pac. 115.

Kentucky: Kentucky L. & I. Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161.

Massachusetts: Kafer *v.* Harlow, 5 All. 348; Leighton *v.* Brown, 98 Mass. 515; Maguire *v.* Pan American Amusement Co., 205 Mass. 64, 91 N. E. 135.

New Mexico: Butts *v.* Woods, 4 N. M. 187, 16 Pac. 617 (plaintiff bound by value stated in his affidavit).

New York: Pettit *v.* Allen, 64 App. Div. 579, 72 N. Y. Supp. 287.

Pennsylvania: Gibbs *v.* Bartlett, 2 W. & S. 29.

Texas: Jacobs *v.* Daugherty, 78 Tex. 682, 15 S. W. 160.

See Plano Manuf. Co. *v.* Downey, 100 Ill. App. 36 (the actual value, and not the value to the plaintiff, which was affected by contracts made by him). Schrader *v.* Wolflin, 21 Ind. 238 (the actual value, and not the amount for which defendant may have sold).

[311] *Alabama:* Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

Connecticut: Ormsbee *v.* Davis, 18 Conn. 555.

Illinois: Hopkins *v.* Ladd, 35 Ill. 178; Walls *v.* Johnson, 16 Ind. 374.

The plaintiff may also recover his costs in the replevin suit,[312] and his counsel fees in that suit.[313] Consequential damages may also be recovered; as for damage to the goods,[314] or depreciation in value,[315] or for loss of a special use.[316]

§ 690. Value of property when to be estimated.

Under the judgment for a return the same question arises, which we have already examined, as to the time when the value should be computed: whether at the time of the original wrongful taking, the time of the replevin, or the time the return should be made.[317] In some cases the time of replevin is to furnish the rule; [318] in other cases the actual value of the property at the time of the demand made under the writ of restitution is to be recovered,[319] provided that if the goods have been used or destroyed, or have deteriorated in value, the value at

Kansas: Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

Kentucky: Kentucky L. & I. Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161.

New York: Emerson *v.* Booth, 51 Barb. 40.

See *Maine:* Howe *v.* Handley, 28 Me. 241 (right of plaintiff ceased during the pendency of the proceedings by reason of a fiat in bankruptcy: he is entitled to interest up to that time).

[312] *Delaware:* Harmon *v.* Collins, 2 Pennew. 36, 45 Atl. 541.

Indiana: Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463.

Kansas: Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

Maine: Hovey *v.* Coy, 17 Me. 266.

New York: Tibbles *v.* O'Connor, 28 Barb. 538.

Oregon: Carlon *v.* Dixon, 14 Ore. 293, 12 Pac. 394; Jordan *v.* La Vine, 15 Ore. 329, 15 Pac. 281.

Pennsylvania: Tibbal *v.* Cahoom, 10 Watts, 232.

South Carolina: Rhodes *v.* Burkart, 28 S. C. 155, 5 S. E. 347.

Contra, Brock *v.* Bolton, 37 S. C. 40, 16 S. E. 370 (by statute and form of the bond)).

And see *Massachusetts:* Maguire *v.* Pan-American Amusement Co., 205 Mass. 64, 91 N. E. 135.

[313] Harts *v.* Wendell, 26 Ill. App. 274; Pace *v.* Neal, 92 Ill. App. 416.

Contra, Davis *v.* Crow, 7 Blackf. (Ind.) 129.

[314] Newton *v.* Round, 109 Iowa, 286, 80 N. W. 391.

[315] *Connecticut:* Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

New York: Rowley *v.* Gibbs, 14 Johns. 385.

[316] Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

[317] *Ante,* § 533.

[318] *United States:* Washington Ice Co. *v.* Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. 947.

Kansas: Union Stove & Machine Works *v.* Breidenstein, 50 Kan. 53, 31 Pac. 703.

New York: Brizsee *v.* Maybee, 21 Wend. 144.

[319] *Indiana:* Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

Maine: Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462.

Massachusetts: Leighton *v.* Brown, 98 Mass. 515; Swift *v.* Barnes, 16 Pick. 194.

the time of replevin, with interest, should be allowed.[320] Where the property replevied was grain it appeared that the plaintiff in the replevin suit had threshed and marketed the grain. In an action on the bond it was said that ordinarily the measure of damages was the value of the property at the time the return was ordered, but in this case the cost of threshing and marketing would be deducted in the absence of evidence that the plaintiff did not act in good faith.[321]

§ 691. Destruction of property before payment.

In a case in New York, it was decided in a suit on the replevin bond, that the non-return of the property was excused by its inevitable destruction before judgment.[322] This decision was based on the old rule that if the condition of a bond becomes impossible by the act of God, the penalty is saved.[323] The case has been expressly disapproved.[324] But in Walker *v.* Osgood [325] it appeared that the property, a horse, had been replevied by one who claimed to be owner from a sheriff who seized it as the property of another. In an action upon the replevin bond by the sheriff, who had succeeded in the replevin suit, the claimant was held excused by showing that the horse had died without his fault; for, the court said, he had as good right to litigate his claim as the attaching creditor. And in a similar case on a forthcoming bond to deliver a slave, the death of the slave before forfeiture was held a defence.[326] Where under a statute a license was replevied, which was in force at the time the judgment for a return was issued, but had expired before a demand was made, it was held that the value of the license at the time of the judgment could be recovered on the bond.[327]

Where the property accidentally becomes worthless, as by the death of an animal, without the fault of anyone, the conclusion would seem to be either (1) that the old view that the

[320] *Indiana:* Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

Massachusetts: Parker *v.* Simonds, 8 Met. 205, 41 Am. Dec. 497.

[321] Clement *v.* Duffy, 54 Iowa, 632, 7 N. W. 85.

[322] Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589.

[323] 2 Black. Com. 341.

[324] Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614. See Hinkson *v.* Morrison, 47 Iowa, 167.

[325] 53 Me. 422.

[326] Philipi *v.* Capell, 38 Ala. 575.

[327] Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023.

condition has become impossible through an act of God, settles the matter, or (2) that for this purpose, the loss of the property is to be considered as one of the necessary perils which existed in the fact that questions of possessory right cannot be litigated and decided without *delay*, and that this is an exposure to risk to be imputed to the law itself, or (3) that the loss should fall upon the person who turns out to have been wrong in the original assertion of title. Were the question a new one, we should be inclined to think the third view the correct one. While it is true, as Kent, J., in Walker *v.* Osgood [328] points out, that one side has as much right as the other to litigate the first, the very object of the bond is to compel the person in possession to give security for the benefit of the party out of possession, and he should therefore be held responsible for the consequences of the delay caused by his mistake, however honest. Of course, if it can be proved that the property was actually worthless at the time of the replevin through some inherent defect, the case is different, for the property then never had anything but a nominal value.

§ 691a. Reduction of damages.

Though the suit was not entered in court, the defendant, in an action upon the bond, may show that the title to the property replevied was in himself; and in that case only nominal damages can be recovered.[329] So it may be shown that the action of replevin failed merely because it was prematurely brought.[330] Even if judgment was given for a return, that does not necessarily bar the defendant in an action on the bond from showing his title. Replevin is a possessory action, and the issue may have been found in favor of a return without the title having been litigated. In that case the defendant is not concluded by the judgment, and may show in reduction of dam-

[328] 53 Me. 422.

[329] *Illinois:* Schweer *v.* Schwabacher, 17 Ill. App. 78.

Indiana: Wallace *v.* Clark, 7 Blackf. 298.

Kansas: Little *v.* Bliss, 55 Kan. 91, 39 Pac. 1025.

Maine: Jones *v.* Smith, 79 Me. 452.

Massachusetts: Easter *v.* Foster, 173 Mass. 39, 53 N. E. 132, 73 Am. St. Rep. 257.

Michigan: Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155, 1 Am. St. Rep. 603.

[330] Davis *v.* Harding, 3 All. (Mass.) 302.

ages that he owned the property [331] or an interest in it.[332] If, however, title was put in issue in the replevin suit, the question cannot again be raised in an action on the bond.[333]

So if the property itself, or a part of it, or its proceeds have come to the plaintiff in the action on the bond, his recovery will be reduced by the property or value that has come to him.[334] And any other matter which may properly be shown in reduction will have the same effect.[335]

§ 691b. Limitations of plaintiff's title.

The fact that the plaintiff has a limited or partial title only cannot be set up by the defendant to defeat a full recovery,

[331] *Connecticut:* Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454.

Illinois: Hanchett *v.* Gardner, 138 Ill. 571, 28 N. E. 788; O'Donnell *v.* Colby, 153 Ill. 324, 38 N. E. 1067; Farson *v.* Gilbert, 85 Ill. App. 364; Magerstadt *v.* Harder, 95 Ill. App. 303.

Indiana: Stockwell *v.* Byrne, 22 Ind. 6.

Iowa: Buck *v.* Rhodes, 11 Ia. 348.

Kansas: Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025.

Maryland: Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

[332] *Illinois:* King *v.* Ramsey, 13 Ill. 619 (general title subject to attachment).

Indiana: McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161 (lien); Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987 (mortgage); Consolidated T. L. Co. *v.* Bronson, 2 Ind. App. 1, 28 N. E. 155 (mortgage).

Maryland: Walter *v.* Warfield, 2 Gill, 216 (agent of owner).

Massachusetts: Leonard *v.* Whitney, 109 Mass. 265 (part owner).

North Carolina: Hall *v.* Tillman, 115 N. C. 500, 20 S. E. 726 (contract of purchase).

[333] *Indiana:* Denny *v.* Reynolds, 24 Ind. 248.

Iowa: Hawley *v.* Warner, 12 Iowa, 42.

[334] *Connecticut:* Vinton *v.* Mansfield, 48 Conn. 474 (property sold and proceeds paid to plaintiff).

Indiana: Story *v.* O'Dea, 23 Ind. 326 (plaintiff had forcibly taken the property from defendant).

Iowa: Harrow *v.* Ryan, 31 Ia. 156 (plaintiff obtained property by legal proceedings); Stuart *v.* Trotter, 75 Ia. 96, 39 N. W. 212 (judgment for value paid to plaintiff).

Kansas: Boyd *v.* Huffaker, 39 Kan. 525, 18 Pac. 508 (property sold pending proceedings and proceeds delivered to present plaintiff).

Kentucky: Board *v.* Moore, 12 Ky. L. Rep. 682 (part of property returned; recovery for value of remainder only).

Nebraska: Barton *v.* Shull, 62 Neb. 570, 87 N. W. 322 (plaintiff obtained property by levy on execution); Rinker *v.* Lee, 29 Neb. 783, 46 N. W. 211 (property replevied from present defendant pending proceedings and returned to present plaintiff).

Pennsylvania: Pure Oil Co. *v.* Terry, 209 Pa. 403, 58 Atl. 814 (property bought by present plaintiff at sale).

See *Massachusetts:* Flagg *v.* Tyler, 6 Mass. 33, 4 Am. Dec. 76 (owner became bankrupt; goods given to his assignee).

[335] *Connecticut:* Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928 (tender after breach).

Illinois: Harts *v.* Wendell, 26 Ill. App. 274 (tender after breach).

Pennsylvania: Snyder *v.* Frankfield, 4 Pa. Dist. Rep. 767 (set-off).

when the defendant does not himself own a part interest in it.[336] But if the defendant can show not only that the plaintiff owns a part interest only, but also that he himself owns the remaining interest, the plaintiff's recovery is limited to the value of his interest.[337]

§ 691c. Detinue bonds.

A detinue bond is similar to a replevin bond, and damages are assessed on the same principles. Damages may be recovered though not assessed in the detinue action,[338] and include damages actually sustained by the seizure, but not for loss of time and hotel bills paid in procuring sureties on the bond, and in attending the trial of the case.[339] Counsel fees paid by the plaintiff may be recovered.[340] The defendant may show in reduction of damages that he was the owner of the property sued for.[341] Where part of the property was burned after the bond was given, the measure of recovery in an action on the bond was the value of the property destroyed as found by the jury and the amount of damage to the other property; for *prima facie*, the injury is the result of the detention.[342]

[336] *Illinois:* Atkins *v.* Moore, 82 Ill. 240, 25 Am. Rep. 313.

Maine: Farnham *v.* Moor, 21 Me. 508 (attaching sheriff).

Michigan: Williams *v.* Vail, 9 Mich. 162, 80 Am. Dec. 76; Ryan *v.* Akeley, 42 Mich. 516, 4 N. W. 207 (attaching sheriff).

Missouri: Fallon *v.* Manning, 35 Mo. 271 (part owner); Frei *v.* Vogel, 40 Mo. 149 (attaching sheriff).

[337] *Colorado:* Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803 (attaching sheriff and owner).

Connecticut: Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147 (partners).

Georgia: Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251 (pledgee and pledgor).

Illinois: King *v.* Ramsey, 13 Ill. 619 (attaching sheriff and owner); Warner *v.* Matthews, 18 Ill. 83; Jackson *v.* Bry, 3 Ill. App. 586 (mortgagor and mortgagee); Tanton *v.* Slyder, 93 Ill. App. 455 (owner and sheriff levying by virtue of executions)

Iowa: Hawley *v.* Warner, 12 Ia. 42; Hayden *v.* Anderson, 17 Ia. 158 (attaching sheriff and owner).

Maine: Hacker *v.* Johnson, 66 Me. 21, 22 Am. Rep. 547 (partner).

Maryland: Mason *v.* Sumner, 22 Md. 312 (landlord and tenant).

Michigan: Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381 (attaching sheriff and owner of judgment).

Missouri: Dilworth *v.* McKelvy, 30 Mo. 149.

New York: Russell *v.* Butterfield, 21 Wend. 300 (mortgagor and mortgagee).

[338] Hudson *v.* Young, 25 Ala. 376.

[339] Foster *v.* Napier, 74 Ala. 393.

[340] Ferguson *v.* Baker, 24 Ala. 402; Miller *v.* Garrett, 35 Ala. 96; Foster *v.* Napier, 74 Ala. 393.

[341] Savage *v.* Gunter, 32 Ala. 467; Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738.

[342] Heard *v.* Hicks, 101 Ala. 102, 13 So. 256.

§ 691d. Other judicial bonds.

A sequestration bond is security for damages caused by the seizure of the property and does not cover counsel fees incident to the defense of the suit.[343] The plaintiff in an action on the bond may recover loss of rents and compensation for the expense and inconvenience of removal.[344]

In an action on a bond to contest a "claim of exemptions," the plaintiff may recover the legal and other expenses incurred in meeting the contest.[345]

In an action on a bond given to secure the appointment of a receiver for plaintiff's business, she may recover the value of the property sold by the receiver, and damages for injury to the business.[346]

C.—Official Bonds

§ 692. Official bonds in general.

The questions examined in the chapter upon the measure of damages in suits against public officers may arise, as in the instances which we have considered, in suits brought by the aggrieved party against the officer directly; or otherwise, on the bond, given by him for the faithful discharge of his duty; or again, they may be brought against the sureties of the officer. In the case of the suit being brought on the bond, much depends on the form of the instrument and the statute under which it is given. The statute must be substantially complied with.[347] If, however, the penalty is larger than the statute permits, the bond is valid up to the legal amount, and judgment may be given for the penalty, execution being limited to the legal amount; [348] and if the bond does not comply with the statute it may be good as a common-law bond.[349]

[343] Stauffer *v.* Garrison, 61 Miss. 67.

[344] Blum *v.* Gaines, 57 Tex. 135.

[345] Kirby *v.* Forbes, 141 Ala. 294, 37 So. 411.

[346] Haverly *v.* Elliott, 39 Neb. 201, 57 N. W. 1010.

[347] *Mississippi:* Brown *v.* Phipps, 6 Sm. & M. 51 (cannot be extended to cover other cases than those intended by the act).

North Carolina: State Bank *v.* Locke, 4 Dev. 529.

Ohio: Creswell *v.* Nesbitt, 16 Oh. St. 35.

[348] *Pennsylvania:* McCaraher *v.* Commonwealth, 5 W. & S. 21, 39 Am. Dec. 106.

South Dakota: State *v.* Taylor, 10 S. D. 182, 72 N. W. 407, 65 Am. St. Rep. 707.

[349] *Maine:* Scarborough *v.* Parker, 53 Me. 252.

New York: Allegany County *v.* Van Campen, 3 Wend. 49.

The bond is usually given to the State, but is for the benefit of any person injured by the official misfeasance.[350] The commonest practice is to give judgment for the amount of the penalty, and issue execution for the damages found by the jury, as in the case of an ordinary bond,[351] and the judgment then remains as security for further recovery by other persons injured.[352] When the penalty has been exhausted, either by one recovery or by successive proceedings, no further recovery may be had on the bond; [353] and all suits pending at one time

North Carolina: State *v.* Perkins, 10 Ired. L. 333.

Ohio: Davisson *v.* Burgess, 31 Oh. St. 78, 27 Am. Rep. 496.

Pennsylvania: Forsyth *v.* Dickson, 1 Grant, 26.

Tennessee: Goodrum *v.* Carroll, 2 Humph. 490, 37 Am. Dec. 564.

[350] *Massachusetts:* Skinner *v.* Phillips, 4 Mass. 68.

New York: People *v.* Holmes, 2 Wend. 281.

South Carolina: Mitchell *v.* Laurens, 7 Rich. 109.

Tennessee: Governor *v.* Allen, 8 Humph. 176, 47 Am. Dec. 601 (to the governor).

No individual can recover for an injury to another individual. Wilson *v.* Cantrel, 19 Ala. 642.

[351] *Arkansas:* Byrd *v.* State, 15 Ark. 175.

Iowa: Nelson *v.* Gray, 2 Greene, 397; Cameron *v.* Boyle, 2 Greene, 154.

Kentucky: Wells *v.* Commonwealth, 8 B. Mon. 459, 48 Am. Dec. 401.

Pennsylvania: Scarborough *v.* Thornton, 9 Pa. 451; Com. *v.* Sayres, 1 Miles, 235.

There can be no recovery beyond the penalty, with interest.

Connecticut: Olmstead *v.* Olmstead, 38 Conn. 309.

Kentucky: Woods *v.* Com., 8 B. Mon. 112.

But see *Pennsylvania:* Hughes *v.* Hughes, 54 Pa. 240.

In Georgia and Pennsylvania by statute judgment is entered only for the amount of the damages proved, and further judgments may be given in subsequent actions.

Georgia: Taylor *v.* Johnson, 17 Ga. 521.

Pennsylvania: Wolverton *v.* Commonwealth, 7 S. & R. 273; Campbell *v.* Commonwealth, 8 S. & R. 414; Withrow *v.* Commonwealth, 10 S. & R. 231.

In *New York*, under the old practice, debt on the bond must be brought in the name of the State, for the penalty; but an individual might sue in covenant and get judgment for the injury to him. Lawton *v.* Erwin, 9 Wend. 233; O'Connor *v.* Such, 9 Bosw. 318.

In *Illinois*, in the case of executor's bond only, successive suits might be brought on the bond and separate judgments had. People *v.* Randolph, 24 Ill. 324.

In Maine and Pennsylvania damages are to be assessed by the court and not by the jury, at the actual damage sustained by the breach.

Maine: Clifford *v.* Kimball, 39 Me. 413.

Pennsylvania: Com. *v.* Allen, 30 Pa. 49, 72 Am. Dec. 685.

[352] *Colorado:* Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

New York: Fellows *v.* Gilman, 4 Wend. 414.

North Carolina: State *v.* McAlpin, 6 Ired. 347.

[353] *Illinois:* People *v.* Summers, 16 Ill. 173.

should be consolidated, and if the aggregate of the damages exceeds the amount of the penalty (or the amount still due on the bond) all the plaintiffs should recover ratably.[354]

The amount recovered is the actual damage; and therefore if a statute gives a penalty for official misfeasance the amount of the penalty cannot be recovered on the bond, but only the actual loss.[355] Nor can exemplary damages be recovered on the bond.[356] But where interest at a high rate is fixed by statute as recoverable for failure by a public officer to pay over money, this is not regarded as penalty, and interest at the statutory rate may be recovered on the bond.[357]

Actual compensation for the injury is the measure of recovery on the bond. Thus, where a commissioner to construct a drain filed a bond, and collected the assessment for building it, but failed to complete the drain, in an action on the bond it was held that the measure of damages was the amount required to complete the drain.[358] But where a receiver of public moneys neglected the duties of the office, it was held that the government could not pay an extravagant sum for the performance of the labor neglected by the receiver, and charge his sureties with such sum; it could only recover what would be a reasonable compensation for the labor performed.[359]

§ 692a. Acts outside official duty.

Parties on an official bond are liable only for such acts as are violations of official duty; and their liability therefore does not extend to any act not within the scope of such duty.[360] So, for

Indiana: State *v.* Ford, 5 Blackf. 392.

[354] *Indiana:* Moody *v.* State, 84 Ind. 433.

Iowa: Edmonds *v.* Edmonds, 73 Ia. 427, 53 N. W. 505; Hooks *v.* Evans, 68 Ia. 52, 25 N. W. 925.

Missouri: State *v.* Ruggles, 20 Mo. 99.

South Carolina: Mitchell *v.* Laurens, 7 Rich. 109.

[355] *Mississippi:* Foote *v.* Van Zandt, 34 Miss. 40.

South Carolina: Treasurers *v.* Buckner, 2 McMull. 323.

[356] *Indiana:* Peelle *v.* State, 118 Ind. 512, 21 N. E. 288.

Kentucky: Johnson *v.* Williams, 23 Ky. L. Rep. 658, 63 S. W. 759, 54 L. R. A. 220; United States F. & G. Co. *v.* Milstead, 33 Ky. L. Rep. 186, 109 S. W. 875.

Oklahoma: Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

[357] *Georgia:* Wyche *v.* Myrick, 14 Ga. 584.

Kentucky: Sanders *v.* Bank of Kentucky, 2 Met. 327.

[358] Smith *v.* State, 117 Ind. 167.

[359] United States *v.* Wann, 3 McLean, 179.

[360] *District of Columbia:* United States *v.* West, 8 D. C. App. 59, 67.

instance, if it is not the duty of an officer to collect money, his bondsmen are not liable for money collected and embezzled by him.[361] And if after the bond is executed new duties of a different sort are put upon the officer, such as the duty of collecting money on a mere clerical officer, the bond, while it continues to cover the original duties,[362] does not cover acts done in pursuance of the newly assumed duties.[363] And so if a county treasurer has placed upon him also the duty of collector of school funds he nevertheless does not collect them in his capacity as treasurer; and the parties to his treasurer's bond are

Illinois: Burlington Ins. Co. *v.* Johnson, 120 Ill. 622, 12 N. E. 205; People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

So where one employed to sell machines bought one himself and failed to pay for it the sureties on his bond were not liable for the price, since the purchase was not within the scope of his employment. Weed Sewing Machine Co. *v.* Winchel, 107 Ind. 260, 7 N. E. 881.

[361] *Alabama:* Dean *v.* Governor, 13 Ala. 526 (sheriff embezzling money collected after return day).

California: Heidt *v.* Minor, 89 Cal. 115, 26 Pac. 627 (notary public borrowing money on forged deed).

Georgia: Mason *v.* Com., 104 Ga. 35, 48, 30 S. E. 513 (county treasurer embezzling money received on a void loan).

Illinois: People *v.* Moon, 4 Ill. 123 (county treasurer embezzling money deposited by State, with county).

Indiana: Jenkins *v.* Lemonds, 29 Ind. 294 (clerk of court embezzling money received from counsel); Salem *v.* McClintock, 16 Ind. App. 656, 46 N. E. 39, 59 Am. St. Rep. 330 (superintendent of waterworks embezzling rents collected by him).

Kentucky: Commonwealth *v.* Cole, 7 B. Mon. 250 (constable embezzling money voluntarily paid him by debtors); Hardin *v.* Carrico, 3 Met. 289, 77 Am. Dec. 174 (clerk of court embezzling money paid into court).

Massachusetts: Boston *v.* Moore, 3 Allen, 126 (constable embezzling money voluntarily paid him by debtors).

Mississippi: Matthews *v.* Montgomery, 25 Miss. 150 (clerk of court embezzling fees paid to other officers).

Nebraska: State *v.* Moore, 56 Neb. 82, 76 N. W. 474 (auditor embezzling fees collected from insurance companies); Stephens *v.* Hendee, 80 Neb. 754, 115 N. W. 283 (county judge takes estate prior to appointment of administrator).

New York: People *v.* Pennock, 60 N. Y. 426 (town supervisor).

North Carolina: Mills *v.* Allen, 7 Jones, 564, 78 Am. Dec. 265 (sheriff embezzling money collected without process).

A justice of the peace collects a note in his official capacity; his bondsmen are holden if he embezzles the money collected. Widener *v.* State, 45 Ind. 244; *acc.*, Bosley *v.* Smith, 3 Humph. (Tenn.) 406 (money collected by constable without process).

[362] Mayor *v.* Kelly, 98 N. Y. 467, 50 Am. Rep. 699.

[363] *New Jersey:* Kellogg *v.* Scott, 58 N. J. Eq. 344, 44 Atl. 190.

New York: Mayor *v.* Kelly, 98 N. Y. 467, 50 Am. Rep. 699.

Pennsylvania: Shackamaxon Bank *v.* Yard, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807; Harrisburg S. & L. Assoc. *v.* United States F. & G. Co., 197 Pa. 177, 46 Atl. 910.

not liable if he embezzles money so collected.[364] So where a chief of police made an arrest under color of office, but quite beyond his official duties, the sureties on his bond were not liable.[365] And where a sheriff was not given the duty of collecting taxes in arrear, due to his predecessor, his bondsmen were not liable for his embezzlement of taxes so collected.[366]

The duties for the performance of which the sureties are liable are such as may be defined by law; and for all duties so defined at the time the bond is executed the sureties must answer.[367] The duties may be defined after the execution of the bond; but in that case they cannot be extended beyond the ordinary duties of such an office.[368]

If the official is transferred to a different office, his old bond does not cover the duties of the new office; [369] and it has been held that where an official held two offices and gave a single bond to cover both, and the offices were afterward divided and he continued to hold one of them, the bond did not cover his acts thereafter, because the radical alteration in his duties discharged his sureties.[370]

§ 692b. Liability for acts before or after regular term of bond.

Since the term of a public officer ordinarily extends until his successor is elected and qualified, it is not uncommon for a term to be prolonged by reason of the failure of the successor to qualify promptly. The official bond sometimes expressly

[364] *Minnesota:* State *v.* Young, 23 Minn. 551.

North Carolina: County Board of Education *v.* Bateman, 102 N. C. 52, 8 S. E. 862, 11 Am. St. Rep. 708.

And see to the same effect:

California: People *v.* Gardner, 55 Cal. 304 (same person being Surveyor General and Registrar of Land Office).

Kentucky: Anderson *v.* Thompson, 10 Bush, 132 (sheriff also acting as collector of taxes).

Ohio: State *v.* Corey, 16 Oh. St. 17 (township treasurer acting also as school treasurer).

[365] State *v.* McDonough, 9 Mo. App. 63; *acc.*, Governor *v.* Pearce, 31 Ala. 465.

[366] Middleton *v.* Caldwell, 4 Bush (Ky.), 392.

[367] Richland County *v.* Owen, 68 S. E. 753.

[368] Lafayette *v.* James, 92 Ind. 240, 47 Am. Rep. 140.

[369] *Maryland:* First Nat. Bank *v.* Gerke, 68 Md. 449, 13 Atl. 358.

New York: National M. B. Assoc. *v.* Conkling, 90 N. Y. 116, 43 Am. Rep. 146.

North Carolina: Sun L. I. Co. *v.* United States F. & G. Co., 130 N. C. 129, 40 S. E. 975.

[370] King *v.* Herron, [1903] 2 Ire. 474.

covers defaults during this period;[371] and even when there is no express provision the bond is sometimes held to cover such defaults.[372] But by the prevailing view the bond does not cover defaults after the expiration of the term for which it was given.[373] In Iowa the bond covers defaults while the officer is holding over pending the qualification of a successor, but not where he holds office for several terms without newly qualifying.[374]

The liability on the bond ceases at the end of the original term though during the term the legislature increases the length of it;[375] and on the other hand it continues throughout the original term though the legislature by an unconstitutional act attempts to shorten the term.[376] And if the term of office lasts for more than a year the original bond continues in force during the term, though a statute requires a new bond to be given annually, and this was not done.[377]

The bondsmen are not generally responsible for defaults be-

[371] *Indiana:* State *v.* Berry, 50 Ind. 496.

New Jersey: Camden *v.* Ward, 67 N. J. L. 558, 52 Atl. 392.

New York: Ulster County Savings Institution *v.* Young, 161 N. Y. 23, 55 N. E. 483.

[372] *California:* Placer Co. *v.* Dickerson, 45 Cal. 12.

Illinois: People *v.* Beach, 77 Ill. 52.

Iowa: Plymouth Co. *v.* Kerseborm, 108 Ia. 304, 79 N. W. 67, 65 Am. St. Rep. 257.

Kentucky: Rodes *v.* Commonwealth, 6 B. Mon. 359 (statutory).

Mississippi: Thompson *v.* State, 37 Miss. 518.

Missouri: State *v.* Kurtzeborn, 78 Mo. 98.

North Carolina: State *v.* Daniels, 6 Jones, 444.

See Tuley *v.* State, 1 Ind. 500 (no provision for officer holding over till successor qualified: sureties not liable for defaults after expiration of term).

[373] *Indiana:* Rany *v.* Governor, 4 Blackf. 2; Steinback *v.* State, 38 Ind. 483.

Kansas: Riddel *v.* School District, 15 Kan. 168.

Massachusetts: Bigelow *v.* Bridge, 8 Mass. 274, 5 Am. Dec. 105.

New Hampshire: Dover *v.* Twombly, 42 N. H. 59.

New Jersey: Rahway *v.* Crowell, 40 N. J. L. 207, 29 Am. Rep. 224.

North Carolina: Thomas *v.* Summey, 1 Jones, 554.

South Carolina: South Carolina Society *v.* Johnson, 1 McCord, 41, 10 Am. Dec. 644; Commissioners *v.* Greenwood, 1 Desaus. 450.

[374] Wapello *v.* Bigham, 10 Ia. 39, 72 Am. Dec. 370, explained in Plymouth Co. *v.* Kerseborm, 108 Ia. 304, 79 N. W. 67, 65 Am. St. Rep. 257.

[375] *California:* Brown *v.* Lattimore, 17 Cal. 93.

Indiana: Mulliken *v.* State, 7 Blackf. 77.

Washington: King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500.

[376] People *v.* Foote, 19 Johns. (N. Y.) 58.

[377] Kelly *v.* Moody, 12 Ky. L. Rep. 389.

fore the execution of the bond.[378] But if a default is discovered during the term the bondsmen are responsible unless they prove that the default occurred before the execution of the bond.[379] And where an executor's bond was conditioned on obeying all orders of the court touching the administration of the estate, the sureties were liable for money lost before the bond was executed, but brought into the account and ordered to be paid over while the bond was in force.[380]

§ 692c. Liability on cumulative bonds.

It sometimes happens that officers are ordered to file additional bonds; and the question may then arise as to the liability on the successive bonds. It is usually held that the second bond covers defaults before it is given as well as after, since the liability to account exists after the giving of the second bond.[381] If the first bond is discharged upon the approval of the second, recovery may still be had upon it for all defaults prior to the discharge.[382]

The sureties on the two bonds are entitled to have their respective rights adjusted in equity. In the ordinary case they will contribute equally.[383] But where the sureties on a subsequent bond become liable for a default which really occurred

[378] Farrar *v.* United States, 5 Pet. 373, 8 L. ed. 373; United States *v.* Spencer, 2 McLean, 405.

[379] United States *v.* Dudley, 21 D. C. 337.

[380] Scofield *v.* Churchill, 72 N. Y. 565.

[381] *Arkansas:* Dugger *v.* Wright, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48.

Illinois: Ammons *v.* People, 11 Ill. 6 (additional surety on same bond); Pinkstaff *v.* People, 59 Ill. 148; Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189.

Iowa: Douglass *v.* Kessler, 57 Ia. 63, 10 N. W. 313 (but see Bessinger *v.* Dickerson, 20 Ia. 260; Thompson *v.* Dickerson, 22 Ia. 360); Knox *v.* Kearns, 73 Ia. 286, 34 N. W. 861.

Kansas: Brown *v.* State, 23 Kan. 235.

Massachusetts: Choate *v.* Arrington, 116 Mass. 552; Loring *v.* Baker, 3 Cush. 465.

Missouri: State *v.* Finn, 23 Mo. App. 290.

Oregon: Thompson *v.* Dekum, 32 Ore. 506, 56 Pac. 517, 755.

Tennessee: Miller *v.* Moore, 3 Humph. 189.

[382] *Massachusetts:* McKim *v.* Bartlett, 129 Mass. 226.

Missouri: Wolff *v.* Schaefer, 74 Mo. 154; State *v.* Berning, 74 Mo. 87, 41 Am. Rep. 305.

[383] *Massachusetts:* Choate *v.* Arrington, 116 Mass. 552.

North Carolina: Bright *v.* Lennon, 83 N. C. 183.

Oregon: Thompson *v.* Dekum, 32 Ore. 506, 56 Pac. 517, 755.

before their bond was executed, they are entitled to reimbursement from the sureties on the earlier bond, who are primarily liable.[384]

Where separate bonds are given to cover different things, as for instance to cover the management of separate funds, or where a general bond is given and also a separate bond for a special duty, the liabilities of the bondsmen are distinct, each being liable only for defaults covered by his own bond.[385]

§ 692d. Successive bonds to cover successive terms of office.

Where a bond is given in each of several successive terms, each bond covers the defaults of that term only for which it is given; and the bondsmen are not liable either for defaults before their term began [386] or for defaults after their term was completed.[387] It is often the case, however, that an officer is called upon during his term to perform an act which cannot be completed before the expiration of the term, and the law provides that his authority and duty shall continue until full per-

[384] Corrigan *v.* Foster, 51 Oh. St. 225, 37 N. E. 263.

[385] Milwaukee County *v.* Ehlers, 45 Wis. 281. And where a bond is given for the management of one of two separate funds held by the officer, and he embezzles from both funds in an unknown proportion, the bondsmen will be liable for a *pro rata* proportion of the entire amount embezzled. Britton *v.* Fort Worth, 78 Tex. 227, 14 S. W. 585.

[386] *United States:* Meyers *v.* United States, 1 McLean, 493.

Illinois: Coons *v.* People, 76 Ill. 383; Schoenemann *v.* Martyn, 68 Ill. App. 412.

Iowa: Mahaska County *v.* Ingalls, 16 Ia. 81; Warren County *v.* Ward, 21 Ia. 85.

Massachusetts: Rochester *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519.

Michigan: Grand Haven *v.* United States F. & G. Co., 128 Mich. 106, 87 N. W. 104, 92 Am. St. Rep. 446.

Missouri: State *v.* Elliott, 157 Mo. 609, 57 S. W. 1087, 80 Am. St. Rep. 643

North Carolina: State *v.* Lackey, 3 Ire. L. 25.

[387] *United States:* United States *v.* Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; United States *v.* Eckford, 1 How. 250, 11 L. ed. 120.

Connecticut: Williams *v.* Miller, Kirby, 189.

New Hampshire: Dover *v.* Twombly, 42 N. H. 59.

North Carolina: Governor *v.* Cobb, 2 Dev. 489.

South Carolina: State *v.* Bird, 2 Rich. 99.

Vermont: First Nat. Bank *v.* Briggs, 69 Vt. 12, 37 Atl. 231, 60 Am. St. Rep. 922, 37 L. R. A. 845.

Virginia: Commonwealth *v.* Fairfax, 4 Hen. & M. 208; Munford *v.* Rice, 6 Munf. 81.

England: Lord Arlington *v.* Merricke, 2 Saund. 411; Liverpool Water Works *v.* Atkinson, 6 East, 507; Hassell *v.* Long, 2 M. & S. 363; Peppin *v.* Cooper, 2 B. & Ald. 431.

Canada: Waterford School Trustees *v.* Clarkson, 23 Ont. App. 213.

formance. In such a case the liability on the bond given for the term during which the act was begun will continue until it is completed.[388] And a bond may by its express provisions continue beyond the term.[389] Where a default continues through two terms (as where it is a failure to collect money which the officer was at all times under a duty to collect) both sets of bondsmen are liable.[390]

§ 692e. Default in payment of money at end of last term.

Where a default occurs in the payment of money, those bondsmen alone are accountable within whose term the money was received and not paid over. So where it appears that all moneys received during the first term were either properly expended or actually on hand at the beginning of the second term, the bondsmen during the first term will not be liable for a subsequent defalcation: [391] and on the other hand, the bondsmen on the second bond are not liable for money misapplied during the first term, and never actually coming to their

[388] *Colorado:* People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409 (attachment during first term, judgment later).

Illinois: Elkin *v.* People, 4 Ill. 207, 36 Am. Dec. 541 (sheriff sells land during term, receives money to redeem later); McCormick *v.* Moss, 41 Ill. 352 (execution received during first term, levied later).

Massachusetts: Larned *v.* Allen, 13 Mass. 295 (warrant for collection given during term, collection completed later).

Missouri: Marney *v.* State, 13 Mo. 7 (sheriff sells on execution during first term, collects later).

New York: People *v.* McHenry, 18 Wend. 482 (execution levied during first term; proceeds embezzled later, *semble*).

Virginia: Tyre *v.* Wilson, 9 Gratt. 59, 58 Am. Dec. 21 (sheriff levies during term, sells later).

In a few such cases, however, the bondsmen during the first term were held not liable for a default after the expiration of the term.

California: Wood *v.* Lowden, 117 Cal. 232, 49 Pac. 132 (attachment during first term, property injured by neglect later).

Maryland: Robey *v.* Turner, 8 Gill & J. 125 (execution received during first term, failure to levy later).

Tennessee: Sherrell *v.* Goodrum, 3 Humph. 419.

[389] Fink *v.* Farmers' Bank, 178 Pa. 154, 35 Atl. 636, 56 Am. St. Rep. 746.

[390] *Mississippi:* McWilliams *v.* Norfleet, 63 Miss. 183.

Missouri: Ingram *v.* McComb, 17 Mo. 558.

North Carolina: State *v.* Wall, 9 Ired. L. 20.

[391] *Missouri:* State *v.* Paul, 21 Mo. 51.

Nebraska: Paxton *v.* State, 59 Neb. 460, 476, 81 N. W. 383, 80 Am. St. Rep. 689.

New York: Overacre *v.* Garrett, 5 Lans. 156.

hands.[392] And though the account at the end of the first year shows the correct balance carried over, the bondsmen for the second year are not concluded by the recitals of the account, but may show that no balance was in fact carried over;[393] nor does the account, though showing a correct balance, operate to discharge the first bond.[394] The presumption is nevertheless against the last bondsmen; and they will be held liable for a default discovered during their term unless they can prove that the default took place in a previous term.[395]

When income received during the second year is to be applied either to a deficiency of the first year or to one in the second year, a difficult question is presented as to the legal rules for application of payments; and there is some difference in the authorities. If the officer himself applies the payment to the deficit of the first year, the application is either legal, or, if illegal, is itself a default for which his bondsmen of the second year are liable.[396] If no application is directed by the defaulting officer, the money will by the weight of authority be applied on the earliest debt, and the second bondsmen will therefore be held for the default.[397] It would seem that the

[392] *Iowa:* Independent School Dist. *v.* McDonald, 39 Ia. 564.

Kentucky: Newman *v.* Metcalf, 4 Bush, 67; Paducah *v.* Cully, 9 Bush, 323, 15 Am. Rep. 711.

Wisconsin: Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

[393] *Indiana:* Goodwine *v.* State, 81 Ind. 109.

Mississippi: Mann *v.* Yazoo, 31 Miss. 574.

New Jersey: Frost *v.* Mixsell, 38 N. J. Eq. 586.

[394] Miller *v.* Macoupin County, 7 Ill. 50.

[395] *United States:* Bruce *v.* United States, 17 How. 437, 443, 15 L. ed. 129; Alvord *v.* United States, 13 Blatchf. 279.

California: Heppe *v.* Johnson, 33 Cal. 265.

Illinois: Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189, 61 Am. St. Rep. 185.

Maine: Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592.

Minnesota: Board of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374.

Ohio: Kelley *v.* State, 25 Ohio St. 567.

Tennessee: Anderson County *v.* Hays, 99 Tenn. 542, 42 S. W. 266.

[396] *Indiana:* Cook *v.* State, 13 Ind. 154.

Iowa: Independent School Dist. *v.* McDonald, 39 Ia. 564.

Massachusetts: Colerain *v.* Bell, 9 Met. 499.

Minnesota: Pine County *v.* Willard, 39 Minn. 125, 39 N. W. 71, 12 Am. St. Rep. 622.

Vermont: Lyndon *v.* Miller, 36 Vt. 329.

Virginia: Chapman *v.* Commonwealth, 25 Gratt. 721.

[397] *Connecticut:* Hartford *v.* Francy, 47 Conn. 76, 36 Am. Rep. 51.

creditor cannot determine the application so as to exonerate the sureties on one of the bonds.[398] If the income can be traced and shown to be the proceeds of a defalcation in either term, it will be applied in discharge of it.[399]

§ 692f. Bonds of financial officers.

Treasurers are usually held to be debtors for the money received by them, and not mere bailees, and are therefore liable on their bond for a loss of the money even though it was deposited in an apparently solvent bank and lost by failure of the bank,[400] or in a bank or other safe place and lost by robbery,[401]

Indiana: Goodwine *v.* State, 81 Ind. 109; Rogers *v.* State, 99 Ind. 218.

Maine: Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592.

Massachusetts: Sandwich *v.* Fish, 2 Gray, 298.

New Jersey: Frost *v.* Mixsell, 38 N. J. Eq. 586.

New York: Seymour *v.* Van Slyck, 8 Wend. 403.

In *Missouri* there appears to be no presumption, though if it can be shown that the payment was made on account of charges for one year it will be applied to that year. Draffen *v.* Boonville, 8 Mo. 395; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204; St. Joseph *v.* Merlatt, 26 Mo. 233, 72 Am. Dec. 207.

[398] Porter *v.* Stanley, 47 Me. 515, 74 Am. Dec. 501.

There is an intimation to the contrary in State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204. And see United States *v.* January, 7 Cranch, 572, 3 L. ed. 443.

[399] Rogers *v.* State, 99 Ind. 218.

[400] *Georgia:* Lamb *v.* Dart, 108 Ga. 602, 34 S. E. 160.

Illinois: Oeltjen *v.* People, 160 Ill. 409, 43 N. E. 610, 56 Ill. App. 138; Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177.

Kansas: Rose *v.* Douglass Township, 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354.

Mississippi: Griffin *v.* Levee Com., 71 Miss. 767, 15 So. 107.

Missouri: State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322.

Nebraska: Thomssen *v.* Hall County, 63 Neb. 777, 89 N. W. 393, 57 L. R. A. 303.

New York: Tillinghast *v.* Merrill, 151 N. Y. 135, 45 N. E. 375, 56 Am. St. Rep. 612, 34 L. R. A. 678.

North Carolina: Havens *v.* Lathene, 75 N. C. 505.

Texas: Wilson *v.* Wichita County, 67 Tex. 647.

[401] *United States:* United States *v.* Prescott, 3 How. 578, 11 L. ed. 734; Boyden *v.* United States, 13 Wall. 17, 20 L. ed. 527.

Indiana: Halbert *v.* State, 22 Ind. 125; Morbeck *v.* State, 28 Ind. 86.

Iowa: Taylor *v.* Morton, 37 Ia. 550.

Massachusetts: Hancock *v.* Hazzard, 12 Cush. 112, 59 Am. Dec. 171.

Minnesota: Board of Education *v.* Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586.

Missouri: State *v.* Gatzweiler, 49 Mo. 17 (taken by military force).

Montana: Com. *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

Nevada: State *v.* Nevin, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873.

New Jersey: New Providence *v.* McEachron, 33 N. J. L. 339, aff'd 35 N. J. L. 528.

New Mexico: United States *v.* Watts, 1 New Mex. 553.

even if it was lost from a safe provided for the purpose by the county.[402] In a few jurisdictions, however, the treasurer and his bondsmen are relieved from responsibility if without negligence or other breach of duty he deposits the money in a bank which fails,[403] or if he is robbed [404] or loses the money otherwise without fault.[405] The more stringent liability has been held to rest on treasurers only, and not on other officials who have other principal duties but receive money incidentally.[406]

Since the officer must account for all money in his hands, the sureties are liable for all money received before the bond was executed, if there was a liability to account for it after the execution of the bond.[407]

Where the default does not consist in loss of the money, but in some other failure of duty, the measure of damages is such sum as will be compensation for the wrong. For delay in paying over money interest is recoverable.[408] For failure to turn

New York: Muzzy *v.* Shattick, 1 Denio, 233.

Ohio: State *v.* Harper, 6 Oh. St. 607.

Pennsylvania: Commonwealth *v.* Comly, 3 Pa. 372.

[402] *Minnesota:* Hennepin County *v.* Jones, 18 Minn. 199.

Mississippi: Arnold *v.* State, 77 Miss. 463, 27 So. 596, 78 Am. St. Rep. 533.

It seems, however, that where the *bank of deposit* is selected by law the treasurer is not responsible for its failure without his fault. State *v.* Bobleter, 83 Minn. 479, 86 N. W. 461.

[403] State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. Rep. 59.

[404] *Alabama:* State *v.* Houston, 78 Ala. 576.

California: Healdsburg *v.* Mulligan, 113 Cal. 205, 33 L. R. A. 461, 45 Pac. 337.

[405] Wilson *v.* People, 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449, 41 Am. St. Rep. 243.

[406] People *v.* Lucas, 93 N. Y. 585.

[407] *Arkansas:* State *v.* Buck, 63 Ark. 218, 27 S. W. 881.

Massachusetts: McIntire *v.* Lineham, 178 Mass. 263, 59 N. E. 767.

In Bockenstedt *v.* Perkins, 73 Ia. 23, 34 N. W. 488, 5 Am. St. Rep. 652, a suit on a guardian's bond, it appeared that the guardian received the money six days before the bond was executed. It was held that the sureties were not liable for any defalcation before the bond was executed, but they were liable for all money which was in his hands at the time of the execution of the bond; and evidence of the time that elapsed between his receipt of the money and of the execution of the bond would justify a finding that the money was in his hands at the time of execution of it.

[408] *Maryland:* Richardson *v.* State, 2 Gill, 439.

New Jersey: Board of Justices *v.* Fennimore, 1 N. J. L. 242.

See United States *v.* Curtis, 100 U. S. 119, 25 L. ed. 571.

over a tax warrant the bondsmen are liable for the amount of taxes thereby lost.[409] For failure to cancel a paid warrant, whereby it got into circulation again and had to be paid a second time, the damages are the amount of the warrant.[410] For failure to render accounts [411] or to make annual reports [412] only so much may be recovered as the plaintiff can prove to have been lost by reason of the failure. For receiving securities in payment instead of cash, the bondsmen are holden for the amount of the cash.[413]

The approval of the officer's accounts does not release his bondsmen from liability,[414] nor does negligence of the official board which examined and passed the accounts.[415] But the accounting may be so acted on as to amount to a full discharge. So in an action on a state treasurer's bond, it appeared that in turning over his account to his successor the treasurer turned over a large balance evidenced only by certificates of deposit of certain banks. The total amount of the certificates of deposit was the amount for which the treasurer was accountable, less a small amount paid in cash. The treasurer's successor accepted these certificates as cash and opened a running account with the banks in question to the same amount. It was held that this was such a settlement with the preceding treasurer as would discharge him and charge his successor, even though such successor was unable to realize money on these accounts owing to subsequent failure of the banks.[416] Payment of the claim by the officer, in whole or in part, after default will reduce the amount of recovery on the bond.[417] But no re-

[409] Olean *v.* King, 116 N. Y. 355, 22 N. E. 559.

[410] Johnson *v.* Hughes, 12 Ia. 360.

[411] Bocard *v.* State, 79 Ind. 270.

[412] Jemison *v.* Governor, 47 Ala. 390.

[413] Board of Justices *v.* Fennimore, 1 N. J. L. 242.

[414] *Nebraska:* Bush *v.* Johnson County, 48 Neb. 1, 66 N. W. 1023, 5 Am. St. Rep. 373.

New York: Richmond County *v.* Wandel, 6 Lans. 33.

[415] *Nebraska:* Bush *v.* Johnson County, 48 Neb. 1, 66 N. W. 1023, 5 Am. St. Rep. 373.

New York: Supervisors *v.* Otis, 62 N. Y. 88.

[416] State *v.* Hill, 47 Neb. 456, 66 N. W. 541.

[417] Morris Bldg. Assoc. No. 2 *v.* Altmaier, 10 Pa. Co. Ct. 645. But where money was retained by a public officer on false vouchers, application of it to the benefit of the government but in an unauthorized way would not diminish the amount recovered. Ewing *v.* United States, 11 Ariz. 1, 89 Pac. 593.

duction will be made because of failure to prove the claim against the estate of the bankrupt officer and receive a dividend, since there is a right to rely upon the bond for the entire claim.[418] The amount of the compensation due the officer may be withheld, and will then be deducted from recovery on the bond;[419] but not if the officer has made up and rendered his accounts without making any claim for compensation.[420]

§ 692g. Bonds of judicial officers.

A judge is liable on his bond for malfeasance in any ministerial duty.[421] Thus he is liable for refusal to issue a license[422] or an execution,[423] or for the embezzlement of money paid to him by an executor in discharge of an account.[424] A commissioner in equity who accepts an irregular injunction bond is liable on his official bond for the amount of damages suffered by the parties restrained in the injunction suit.[425] Where a notary public takes an acknowledgment of a forged deed, his bondsmen are liable for the value of the property which was supposed to pass by the deed.[426] If the deed was a mortgage deed, it is commonly said that the amount of the loan may be recovered on the bond;[427] but it is more correct to say that the amount recoverable is the value of the property, unless that exceeds the amount of the loan.[428]

Where a probate judge was also the officer to register conveyances, and he neglected to index a deed properly, it was held

[418] Board of County Com'rs *v.* Security Bank, 75 Minn. 174, 77 N. W. 815, 74 Am. St. Rep. 447.

[419] Brunswick *v.* Snow, 73 Me. 177.

[420] Independent School Dist. *v.* McDonald, 39 Ia. 564.

[421] *United States:* Branch *v.* Davis, 29 Fed. 888 (failure to issue proper process for levy of tax to pay plaintiff's claim; plaintiff gets not entire amount of judgment, but damages for delay unless it has become impossible to secure payment).

North Carolina: State *v.* Windley, 99 N. C. 4, 5 S. E. 14 (failure to require sufficient bond from guardian; plaintiff, the ward, recovers amount received and embezzled by guardian with interest).

[422] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[423] Noel *v.* State, 6 Blackf. (Ind.) 523. The insolvency of the execution defendant may be shown in mitigation.

[424] Wright *v.* Harris, 31 Iowa, 272.

[425] Treasurers *v.* Clowney, 2 McMull. (S. C.) 510.

[426] Joost *v.* Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 734.

[427] *Michigan:* Doran *v.* Butler, 74 Mich. 643, 42 N. W. 273.

Missouri: State *v.* Ryland, 163 Mo. 280, 63 S. W. 819.

[428] Heidt *v.* Minor, 89 Cal. 115, 26 Pac. 627.

that a purchaser of the land who was injured thereby could recover on the bond the amount of his loss.[429]

§ 692h. Bonds of clerks of courts.

Where a clerk of court has the duty of acknowledging or recording deeds or of indexing the records, his bondsmen are liable for damage caused by a mistake.[430] So where he took an acknowledgment of a forged mortgage the mortgagee may hold the bondsmen for his loss;[431] when he enters a forged cancellation of mortgage, the purchaser may recover on the bond the amount paid to discharge the mortgage;[432] and where he made a mistaken reference to a mortgage, a grantee could recover his loss from the bondsmen.[433] Where it is the duty of a clerk to receive money his bondsmen are liable for the embezzlement of it.[434] As in other cases, no recovery can be had for consequences which are not proximate results of the wrong. So where a clerk failed to record plaintiff's mortgage on land, but plaintiff was at the time he lent the money chargeable with notice that the title was not in the mortgagor, no damages can be recovered on the bond.[435]

§ 692i. Bonds of sheriffs and constables.

In an action on the bond of a sheriff only the actual damages may be recovered. If a statute provides a penalty or treble damages against a sheriff for misconduct in office, the penalty cannot be recovered in an action on the bond;[436] and the bond covers only breaches of official duty. A breach of an obligation undertaken by the sheriff outside his official duty is not cov-

[429] Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841.

[430] Strain *v.* Babb, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905 (failure to enroll lien; plaintiff recovers value of lien).

[431] People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091.

[432] Appleby *v.* State, 45 N. J. L. 161.

[433] Howe *v.* Taylor, 9 Ore. 288.

[434] State *v.* Boone, 108 N. C. 78, 12 S. E. 897.

[435] Terrell *v.* McLean, 130 Ga. 633, 61 S. E. 485.

[436] *United States:* Gwin *v.* Barton, 6 How. 7, 12 L. ed. 321.

California: Glascock *v.* Ashman, 52 Cal. 493.

Colorado: State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050.

Kentucky: Commonwealth *v.* Bradley, 1 Litt. 48, 13 Am. Dec. 214.

South Carolina: Treasurers *v.* Hilliard, 8 Rich. 412.

Texas: De la Garza *v.* Booth, 28 Tex. 478.

ered by the bond, as failure to pay compensation to a custodian of attached property,[437] or failure to return to a debtor securities which the creditor refused to receive;[438] and so where a sheriff who had no writ of execution pretended to seize and sell land on execution, there was no liability on the bond.[439]

For a wrongful arrest, or for illegal force used in making arrest, the bondsmen are liable, though it was in excess of official duty, since the act was done under color of office.[440] But where the arrest is not apparently legal, the act is not done under color of office, and the bondsmen are not liable; as where the arrest was made outside the State,[441] or on a warrant obviously illegal.[442] Where imprisonment is resorted to as a means of enforcing liability, in an action upon the officer's bond for an escape, the measure of damages is *prima facie* the amount of the judgment; and the insolvency of the prisoner cannot be shown to mitigate the damages; perhaps, as has been suggested, because to allow it would nullify the coercive nature of imprisonment for debt.[443] A later rearrest of the prisoner may be shown in mitigation.[444]

For failure to levy an execution on property the limit of recovery is the value of the property, though that may be less

[437] Wilson *v.* State, 13 Ind. 341.

[438] Brown *v.* Mosely, 11 Sm. & M. (Miss.) 354.

[439] Eaton *v.* Kelly, 72 N. C. 110.

[440] *Indiana:* State *v.* Druly, 3 Ind. 431.

Iowa: Clancy *v.* Kenworthy, 74 Ia. 740, 35 N. W. 427, 7 Am. St. Rep. 508 (ill-treatment after arrest).

Kentucky: Johnson *v.* Williams, 111 Ky. 289, 23 Ky. L. Rep. 658, 63 S. W. 759, 98 Am. St. Rep. 416, 54 L. R. A. 220 (wrong person shot); Growbarger *v.* United States F. & G. Co., 126 Ky. 118, 102 S. W. 873 (arrested person killed after arrest by sheriff).

Mississippi: Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423 (escaping misdemeanant shot).

Nebraska: Kendall *v.* Aleshire, 28 Neb. 707, 45 N. W. 167, 26 Am. St. Rep. 367 (illegal imprisonment).

The damages include damages for mental suffering. Young *v.* Carney, 91 Ia. 559, 60 N. W. 114.

[441] Kendall *v.* Aleshire, 28 Neb. 707, 45 N. W. 167, 26 Am. St. Rep. 367.

[442] Allison *v.* People, 6 Colo. App. 80, 39 Pac. 903.

[443] *Indiana:* Lines *v.* State, 6 Blackf. 464; Lakin *v.* State, 89 Ind. 68 (but see State *v.* Johnson, 1 Ind. 158).

Maryland: State *v.* Lawson, 2 Gill, 62.

Pennsylvania: Karch *v.* Commonwealth, 3 Pa. 269.

Contra, Virginia: Perkins *v.* Giles, 9 Leigh, 397.

See *ante*, § 554.

[444] State *v.* Newcomer, 109 Ind. 243, 8 N. E. 920.

than the amount of the execution.[445] It may be shown in mitigation that the property in question was not subject to levy,[446] or that the same or other property of the debtor is still subject to execution, so that the debt is not lost.[447] In an action for failure to return an execution the plaintiff may recover the entire value of the property sold, where the failure to return the execution has invalidated the sale; [448] otherwise interest on the debt, the payment of which was delayed,[449] or if the failure resulted in the loss of the judgment, the amount of it.[450] When the sheriff took a forthcoming bond which after litigation was adjudged void, the expense of the litigation was held recoverable on the sheriff's bond.[451] For taking an insufficient bond the measure of damages is the amount that would have been recoverable on a good bond.[452] And for other defaults the actual damage only may be recovered.[453] For failure to collect

[445] *Kentucky:* Johnson *v.* Gwathney, 2 Bibb, 186, 4 Am. Dec. 694.

Ohio: State *v.* Myers, 14 Ohio, 538.

But see *Georgia:* Crawford *v.* Word, 7 Ga. 445, where it was held that it could not be shown that the property was incumbered to its full value.

In Harris *v.* Murfree, 54 Ala. 161, it was pointed out that the property would not realize its full value on an execution sale, and that the recovery should be limited to what would be realized at such sale.

[446] Snoddy *v.* Foster, 1 Met. (Ky.) 160.

[447] *Indiana:* State *v.* Dixon, 80 Ind. 150.

Kentucky: Arnold *v.* Commonwealth, 8 B. Mon. 109.

[448] Dunphy *v.* Whipple, 25 Mich. 10.

[449] Norris *v.* State, 22 Ark. 524. See *ante*, § 692.

[450] In Robertson *v.* County Com'rs, 10 Ill. 559, the amount of the judgment was held recoverable although the defendant was wholly insolvent from the time of its issue; but this appears to be based on the form of the statute. It is usually held that the insolvency of the judgment creditor may be shown, with other circumstances bearing on the amount of damages; but the defendant must show the non-collectibility at the time of execution or its collectibility later, the burden being upon him.

South Carolina: Treasurers *v.* Hilliard, 8 Rich. 412.

Texas: Griswold *v.* Chandler, 22 Tex. 637.

[451] Burns *v.* George, 119 Ala. 504, 24 So. 718.

[452] Magnus *v.* Woolery, 14 Wash. 43, 44 Pac. 130. So no recovery can be had for taking a void replevin bond where the plaintiff's claim was proved of no value. Shull *v.* Barton, 67 Neb. 311, 93 N. W. 132.

[453] *United States:* Gwin *v.* Barton, 6 How. 7, 12 L. ed. 321 (failure to levy execution); United States *v.* Moore, 2 Brock. 317 (failure to serve process).

Connecticut: Swan *v.* Bridgeport, 70 Conn. 143, 30 Atl. 110 (failure to return process).

Missouri: State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731 (false return; at least nominal damages).

a debt when collection is within the duty of the officer, the recovery is *prima facie* the amount of the debt, subject, however, to reduction.[454]

The bondsmen are liable for a wrongful attachment of personal property of a third party as property of the debtor,[455] but the sheriff may show in reduction delivery to the owner or to a mortgagee.[456] So where property belonging to the judgment debtor himself is wrongfully sold, he may recover on the bond the value of the property,[457] or if he has bought it back the amount he had to pay for it.[458] If the writ was void, or was not legally executed, the act was nevertheless done under color of office, and the bondsmen are liable,[459] unless it is apparently void on its face.[460]

For failure to pay over money collected by the officer within the scope of his office, the bondsmen are liable for the amount collected, with interest.[461] If securities are taken instead of currency, the value of the securities may be recovered.[462] If, however, the money was collected outside his official duty, it cannot be recovered on the bond.[463]

[454] State *v.* Eskridge, 5 Ire. (N. C.) 411; State *v.* Mangum, 9 Ire. (N. C.) 210.

[455] *Alabama:* Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

Massachusetts: Turner *v.* Sisson, 137 Mass. 191.

Virginia: Sangster *v.* Commonwealth, 17 Gratt. 124.

[456] *Illinois:* People *v.* Crowe, 130 Ill. App. 349.

Indiana: McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739 (mortgaged property sold; may show in mitigation that mortgage still binds the property).

Massachusetts: Lowell *v.* Parker, 10 Met. 309, 43 Am. Dec. 436 (settlement with mortgagee).

[457] *Indiana:* Butler *v.* State, 20 Ind. 169 (constable sells note pledged to him).

Missouri: State *v.* Finn, 13 Mo. App. 285 (sheriff makes false return, resulting in judgment).

[458] *California:* Blewett *v.* Miller, 131 Cal. 149, 62 Pac. 157, 82 Am. St. Rep. 338 (property exempt from execution).

Missouri: State *ex rel.* Schreiber *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44 (exempt land sold; recovers cost of suit to set aside sheriff's deed).

[459] *Massachusetts:* Turner *v.* Sisson, 137 Mass. 191.

Missouri: Rollins *v.* State, 13 Mo. 437, 53 Am. Dec. 151.

[460] State *v.* Timmons, 90 Md. 10, 44 Atl. 1003.

[461] *Arkansas:* Faulkner *v.* State, 9 Ark. 14.

Georgia: Governor *v.* Raley, 34 Ga. 173.

Missouri: State *v.* Cayce, 85 Mo. 456.

North Carolina: State *v.* Pool, 5 Ired. 105.

Ohio: King *v.* Nichols, 16 Oh. St. 80.

[462] *Kentucky:* Fowler *v.* Com., 3 Dana, 135 (bank notes).

Ohio: Griffin *v.* Underwood, 16 Oh. St. 389.

[463] *Illinois:* Henckler *v.* County

§ 692j. Bonds of executors and administrators.

Recovery may be had on an administration bond for the amount of assets of the estate embezzled, wasted, or lost by the executor or administrator.[464] Since a debt owed to the testator by an executor or administrator is regarded by the law as paid to the estate at the moment of appointment, the bondsmen are responsible for the amount of such a debt as well as for the other assets of the estate,[465] even though at the time of his appointment the executor or administrator was in fact insolvent.[466] In an action upon the bond of an administrator *de bonis non* it appeared that he was himself one of the sureties on a bond of a previous administrator. As surety on the bond of the previous administrator he was liable at the moment of his appointment for default of the previous administrator, and although that had not been settled by a decree, it became assets of the estate upon his appointment and his sureties were liable for it. It was his duty as administrator to ascertain the amount and to charge himself with it, and the sureties on his bond were held liable for the amount.[467] In a few States, however, the harshness of the common-law rule is modified, and the bondsmen are liable only for the appraised value of the debt, in view of the insolvency of the debtor.[468] In California the

Court, 27 Ill. 39, 79 Am. Dec. 393 (collection without process).

North Carolina: Governor *v.* Barr, 1 Dev. 65 (collection of taxes).

Ohio: Webb *v.* Anspack, 3 Oh. St. 522 (sale of property by agreement of parties, not on execution).

In *New York:* People *v.* Faulkner, 107 N. Y. 477, 14 N. E. 415, 1 Am. St. Rep. 851, recovery was refused because the default did not come within the language of the bond.

[464] *Alabama:* Thomson *v.* Searcy, 6 Port. 393.

New York: Gottsberger *v.* Smith, 5 Duer, 566.

Ohio: Slagle *v.* Entrekin, 44 Oh. St. 637, 10 N. E. 675.

Tennessee: Horton *v.* Cope, 6 Lea, 155.

In *Mississippi* recovery may be had for the entire value of property removed from the State. Bridges *v.* Maxwell, 34 Miss. 309.

No prior judgment against the administrator is necessary. Chairman *v.* Moore, 2 Murph. (N. C.) 22.

[465] *Alabama:* Wright *v.* Lang, 66 Ala. 389.

Connecticut: Davenport *v.* Richards, 16 Conn. 310.

Ohio: Foster *v.* Wise, 46 Oh. St. 20, 16 N. E. 687, 15 Am. St. Rep. 542.

[466] Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20.

[467] Choate *v.* Thorndike, 138 Mass. 371.

[468] *Indiana:* State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

Missouri: McCarty *v.* Frazer, 62 Mo. 263 (statutory).

common-law rule applies to executors, but not to administrators, who are chargeable only with the appraised value of their debts to the estate.[469]

The estate for which the executor or administrator must account in any State includes money received as ancillary administrator in another State and ordered transmitted to the first State,[470] or otherwise brought into the domestic account;[471] but it does not include a balance left from the sale of land in another State after paying the debts there, since such balance belongs to the heirs there, and does not form part of the general personal estate.[472]

The executor or administrator remains liable as such for a portion of the estate set apart by order of court for a special purpose, as the payment of an annuity or of a deferred legacy.[473] And where he is ordered to sell land to pay debts he is responsible as such, and his bondsmen are therefore held for the proper disposition of the proceeds, since it is a part of his official duty.[474] But when money comes to the executor not as assets of the estate, but in some other way, his bondsmen are not liable for the misuse of it. So if the will gives him power to sell land to pay debts or legacies, he sells the land and receives the proceeds as devisee in trust, and his bondsmen are not held,[475] but he should give a bond as trustee if the administration of the devise is to be secured;[476] and so generally if money is given to him by the will in trust for any purpose.[477] So his bondsmen are not liable for money received upon a policy of

Tennessee: Rader *v.* Yeargin, 85 Tenn. 486, 3 S. W. 178.

[469] In Sanchez *v.* Forster, 133 Cal. 614, 65 Pac. 1077, an administrator with the will annexed was entitled to a legacy under the will; the debt being collectible to that extent, at least, his sureties were chargeable for the debt he owed to the amount of the legacy.

[470] Probate Judge *v.* Heydock, 8 N. H. 491.

[471] Strong *v.* White, 19 Conn. 238, 48 Am. Dec. 158.

[472] Snodgrass *v.* Snodgrass, 1 Baxter (Tenn.), 157.

[473] *Iowa:* Ellyson *v.* Lord, 124 Ia. 125, 99 N. W. 582.

Massachusetts: Hall *v.* Cushing, 9 Pick. 395.

[474] Even though an additional bond be given:

Alabama: Clarke *v.* West, 5 Ala. 117.

Indiana: Salyers *v.* Ross, 15 Ind. 130.

Ohio: Wade *v.* Graham, 4 Ohio, 126.

[475] *Illinois:* People *v.* Huffman, 182 Ill. 390, 398, 55 N. E. 981.

Kentucky: Shields *v.* Smith, 8 Bush, 601; Clay *v.* Hart, 7 Dana, 1.

[476] State *v.* Thresher, 77 Conn. 70, 58 Atl. 460.

[477] Hinds *v.* Hinds, 85 Ind. 312.

insurance payable to the estate,[478] or for income of the real estate collected by him,[479] or for any other money collected by him which does not legally form part of the estate.[480]

For other defaults of the executor or administrator the bondsmen are liable for the actual damage only. Thus for failure to file an inventory the damages are nominal, unless actual damage is shown;[481] but if the omitted assets were converted to the use of the administrator, their value may be recovered on the bond.[482] The rule is the same where the breach alleged was failure to render an account.[483] For failure to pay debts the amount of any particular debt may be recovered, as fixed by a judgment in favor of the creditor,[484] or if the estate is insolvent the percentage of the debt which was paid to other creditors.[485] For failure to distribute the bondsmen are responsible for the amount ordered by the court to be paid over;[486] or if no order of court has been obtained, then an amount based on the balance left in the estate,[487] estimating this amount either by taking the appraised value of the estate with interest or the actual value at the time for distribution, at the election of the distributee.[488]

If a special bond is given the general principles are the same. When upon judgment being given against an administrator he gave a special bond to comply with the order of court, and the court ordered the payment of the judgment out of assets, and there were no assets found, the sureties were liable for costs only, the amount of the judgment not coming within the order

[478] People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 (affirming 94 Ill. App. 652).

[479] Denton *v.* Crouch, 101 Ky. 386, 41 S. W. 277.

[480] Pace *v.* Pace, 19 Fla. 438.

[481] *Connecticut:* Edwards *v.* White, 12 Conn. 28.

Delaware: State *v.* Bloxom, 1 Houst. 446.

Indiana: State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

[482] *Connecticut:* Minor *v.* Mead, 3 Conn. 289.

Ohio: Dawson *v.* Dawson, 25 Oh. St. 443.

[483] *Arkansas:* Scarborough *v.* State, 24 Ark. 20.

Massachusetts: Choate *v.* Arrington, 116 Mass. 552.

[484] *Connecticut:* Willey *v.* Paulk, 6 Conn. 74.

North Carolina: Washington *v.* Hunt, 1 Dev. 475.

[485] Warren *v.* Powers, 5 Conn. 373.

[486] Scofield *v.* Churchill, 72 N. Y. 565.

[487] Rowland *v.* Isaacs, 15 Conn. 115.

[488] Burch *v.* State, 4 Gill & J. (Md.) 444.

of the court.[489] In an action on a bond given by an administrator upon obtaining a license to sell real estate, the measure of damages is the amount of the proceeds of the sale not accounted for by the administrator, and the costs of proceedings to compel him to account, but not counsel fees paid in such proceedings.[490]

Where there are two executors and they give a joint bond, both principals are liable for the default of either.[491]

§ 692k. Bonds of guardians.

In a suit on a guardian's bond, the actual loss suffered by the plaintiffs furnishes the measure of damages. By suit on the bond the guardian may be called upon to pay over any balance found due from him, with interest.[492] Such a suit is in several jurisdictions not allowed until the court of probate or of chancery has called upon the guardian to render an account, and has found a balance due from him.[493] Into this account must be brought all property received by the guardian in another State on account of the appointment for which the bond was given.[494] So where a guardian in Massachusetts was appointed ancillary guardian in Missouri and collected money there, which she included in her account in Massachusetts, but had not yet secured a discharge in Missouri, and upon her resignation as guardian she was ordered to hand over the balance, but claimed that she could not safely hand it over until her accounts in Missouri were approved by the Missouri court, it was held that since she had voluntarily brought the Missouri money into the Massachusetts court of probate and had not appealed from its decree she was bound, and her refusal to hand over the money was a breach of her bond for which she was liable.[495] Such charges as the guardian is entitled to make may be deducted

[489] Banks *v.* McDowel, 1 Cold. (Tenn.) 84.

[490] Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209.

[491] Overton *v.* Woodson, 17 Mo. 453.

[492] *Georgia:* Ray *v.* The Justices, 6 Ga. 303.

Indiana: Peelle *v.* State, 118 Ind. 512, 21 N. E. 288.

Kentucky: Carter *v.* Thorn, 18 B. Mon. 613.

[493] *Indiana:* Hunt *v.* White, 1 Ind. 105. (See State *v.* Strange, 1 Ind. 538.)

New York: Stilwell *v.* Mills, 19 Johns. 304.

[494] McDonald *v.* Meadows, 1 Met. (Ky.) 507.

[495] Brooks *v.* Tobin, 135 Mass. 69.

from the recovery on the bond; but not expenses of maintaining the ward where they could not form the subject of a suit.[496]

For other breaches of the guardian's duty such damages may be recovered on the bond as the breach caused. For a mere failure to render an account, the damages are nominal only;[497] and the same is true for a mere failure to file an inventory,[498] unless it has resulted in a loss of the property, in which case the value of the property may be recovered.[499] For improper investments the bondsmen are liable for the amount invested and lost, with interest;[500] for failure to collect a claim of the ward's estate they are liable for the value of the claim lost by the failure;[501] and for wrongfully incumbering the ward's estate, for the amount of the incumbrance.[502]

Where a guardian obtains authority to sell real estate of the ward, this is not part of his regular official duty; a special bond is given to account for the proceeds, and the sureties on his general bond are not liable.[503] *A fortiori* the bondsmen are not liable for real estate sold wrongfully without proper authority from the court.[504] Where, however, the real estate is not sold by the guardian, but in the course of proceedings for partition, the guardian receives the proceeds as part of the estate

[496] Otis *v.* Hall, 117 N. Y. 131, 22 N. E. 563, 15 Am. St. Rep. 497.

[497] Probate Court *v.* Slason, 23 Vt. 306.

[498] *Indiana:* Buchanan *v.* State, 106 Ind. 251, 6 N. E. 614.

Maine: Fuller *v.* Wing, 17 Me. 222.

[499] Blakeman *v.* Sherwood, 32 Conn. 324.

[500] State *v.* Washburn, 67 Conn. 187, 34 Atl. 1034.

[501] Ames *v.* Williams, 74 Miss. 404, 20 So. 877.

[502] State *v.* Tittmann, 134 Mo. 162, 35 S. W. 579.

[503] *Indiana:* Lowry *v.* State, 64 Ind. 421.

Iowa: Madison County *v.* Johnston, 51 Ia. 152, 50 N. W. 492; Bunce *v.* Bunce, 65 Ia. 106, 21 N. W. 205.

Kansas: Morris *v.* Cooper, 35 Kan. 156, 10 Pac. 588.

Maine: Williams *v.* Morton, 38 Me. 47, 61 Am. Dec. 229.

Massachusetts: Lyman *v.* Conkey, 1 Met. 317, 35 Am. Dec. 374.

Missouri: State *v.* Peterman, 66 Mo. App. 257.

Nevada: Henderson *v.* Coover, 4 Nev. 429.

New York: Allen *v.* Kelley, 55 App. Div. 454, 67 N. Y. Supp. 97.

Contra, Montana: Hughes *v.* Goodale, 26 Mont. 93, 66 Pac. 702, 91 Am. St. Rep. 410 (*semble*).

And if a special bond is given to secure the management of a particular fund, even if it comes within the scope of the guardians' general bond, the sureties on the special bond are primarily liable. Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433.

[504] Johnson *v.* Chamberlain, 18 App. Div. 495, 46 N. Y. Supp. 132.

for which he is accountable, and his bondsmen are liable for misapplication of the proceeds.[505]

§ 693.[a] Bonds of county and town officers.

The general principle of compensation applies to bonds of county and town officers. So where the mayor under color of his office caused a person to be illegally arrested, his bondsmen were liable for damages for the false imprisonment.[506] Where an auditor drew a warrant for payment of an illegal claim, his sureties claimed that the treasurer should not have paid it; but it was held that the treasurer was justified in paying a regularly audited claim and the amount of it could be recovered on the bond.[507] Where a recording officer by an error recorded a $500 mortgage as $200, he was held liable on his bond for the difference.[508] And where a school commissioner sold land at auction, and upon the purchaser refusing to take it sold it again for a smaller sum, he was held liable for failure to compel the first purchaser to take the land; and the measure of damages on the bond was the difference between the purchase price at the two sales, with interest from the time he should have collected the amount from the first purchaser.[509]

In an action on the bond of a city clerk to recover a balance due from him, where it appeared he was entitled to salary, but he also owed the city for a claim not covered by the bond, the city was held entitled to set the salary off against the unsecured claim, and the bondsmen could not demand that the claim on the bond be reduced by the amount of the unpaid salary.[510]

§ 694. Bonds of officers of corporations.

The same general principles apply to the measure of damages on bonds of officers of corporations which we have found to

[a] For § 693 of the eighth ed., see § 681*a*.

[505] Hooks *v.* Evans, 68 Iowa, 52, 25 N. W. 925.

[506] State *v.* MacDaniel, 78 Miss. 1, 27 So. 994, 50 L. R. A. 118, 84 Am. St. Rep. 618.

[507] Graham *v.* State, 66 Ind. 386.

[508] State *v.* Davis, 96 Ind. 539. So where a registrar of deeds failed to index a mortgage, he is responsible for the amount lost by a person who lent money subsequently on a mortgage. Title G. & S. Co. *v.* Commonwealth, 141 Ky. 570, 133 S. W. 577.

[509] Frazier *v.* Laughlin, 6 Ill. 347.

[510] Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

exist on bonds of public officers. The limit of recovery is the penalty of the bond,[511] with interest.[512] The measure of recovery is the actual loss. Where the default is an embezzlement of money, the amounts embezzled, with interest on each amount from the time of embezzlement, may be recovered.[513] If the corporation still owes salary to the officer, the amount of it may be set off, and the balance, with interest, recovered;[514] but the sureties cannot claim to have the amount reduced by salary or other credits of the officer which might have been applied to the reduction of the deficit, but were not so applied.[515] Where the officer wrongfully changed the security held for a debt due to the corporation the measure of damages is not the amount of such debt, but the actual loss caused by the difference in value of the securities.[516] Where the officer failed to protest a note the face of the note is *prima facie* the measure of damages, but the damages may be reduced by showing the insolvency of the parties on the note.[517] Where an assistant cashier failed to prevent or connived at a misappropriation of money by the cashier, his sureties are liable for the amount of the defalcation with interest.[518]

Defaults before the bond was given are not usually covered by it.[519] Where the officer took money before the bond was executed, but falsified his accounts after the bond was in force, it was held that the bondsmen were liable only for the loss caused by the falsification of accounts, which was nominal.[520] Where there is a regular term of office, and the incumbent is elected for successive years, his bond may be indefinite in duration, and thus cover his conduct during his successive terms;[521] but it is ordinarily limited to cover a single term only, in which

[511] State Bank *v.* Johnson, 1 Mill. Const. (S. C.) 404, 12 Am. Dec. 645.

[512] Bank of Brighton *v.* Smith, 12 Allen (Mass.), 243, 90 Am. Dec. 144.

[513] McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776.

[514] Murray *v.* Aiken Mining Co., 39 S. C. 457, 18 S. E. 5.

[515] McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776.

[516] Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405.

[517] Union Bank *v.* Thompson, 8 Rob. (La.) 227.

[518] Fiala *v.* Ainsworth, 63 Neb. 1, 88 N. W. 135, 94 N. W. 153, 93 Am. St. Rep. 420.

[519] State Treasurer *v.* Mann, 34 Vt. 371, 80 Am. Dec. 688.

[520] State *v.* Atherton, 40 Mo. 209.

[521] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

case the bondsmen are liable for such defaults only as occur during the term,[522] or at most for a reasonable time thereafter for the qualification of a successor.[523] If when a defalcation is discovered it is impossible to determine in which term it occurred, the presumption is that it occurred during the current term, and the sureties on the last bond are therefore liable unless they can show that the defalcation happened before that term.[524]

[522] *Connecticut:* Welch *v.* Seymour, 28 Conn. 387.

New York: Ulster County Savings Institution *v.* Ostrander, 163 N. Y. 430, 57 N. E. 627.

Ante, § 692*b*.

[523] Chelmsford Co. *v.* Demerest, 7 Gray (Mass.), 1.

[524] McMullen *v.* Winfield Building & Loan Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236; *ante*, § 692*e*.

CHAPTER XXXIII

ACTIONS UPON NEGOTIABLE INSTRUMENTS

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§ 695. The face value recoverable.

* The subject of negotiable paper is so amply discussed in the various treatises devoted to this particular branch of the law, that it will only be necessary for us in this place to take a brief view of the general principles regulating the compensation awarded for the breach of contracts of this class.**

When recovery can be had upon a negotiable instrument, the amount of recovery is the face value of the instrument, without regard to the amount actually paid for it by the *bona fide* holder.[1] This is usually and correctly held to be true even

[1] *Illinois:* Dickinson *v.* Bull, 72 Ill. App. 75 (legal holder not beneficial owner).

Indiana: Murphy *v.* Lucas, 58 Ind. 360; Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 19 Am. St. Rep. 73; Farber *v.* National Forge & Iron Co., 140 Ind. 54, 39 N. E. 249.

Iowa: Nat. Bank *v.* Green, 33 Ia. 140.

Kansas: St. Louis, F. S. & W. R. R. *v.* Chenault, 36 Kan. 51, 12 Pac. 303 (holder is treasurer of company that made the note).

Michigan: Vinton *v.* Peck, 14 Mich. 287.

New Jersey: Durant *v.* Banta, 27 N. J. L. 624.

New York: Murray *v.* Judah, 6 Cow. 484; Deas *v.* Harvie, 2 Barb. Ch. 448.

Wisconsin: Croft *v.* Bunster, 9 Wis. 503.

A purchaser who has paid only part of the amount agreed upon, and then receives notice of fraud or lack of consideration, can recover only the amount he advanced before notice. Dresser *v.*

though the maker might have a complete defence against the original payee; [2] but in several jurisdictions the holder is limited, in such a case, to the amount he paid for it.[3] The case of a pledgee presents an exception to this general rule, which will be considered later.[4]

In Massachusetts the anomalous doctrine prevails that in a suit between the original parties, if the consideration of a note is inadequate, or fails in part, the amount equitably due may be recovered in an action upon the note.[5] So where a note was given for the purchase of a horse, which proved to be unsound, the court deducted from the amount of the note the difference in value of the horse if he had been sound and as he actually was.[6] This peculiar doctrine is to be distinguished from the well-established principle allowing, in the proper case, recoup-

Missouri & I. R. R., 93 U. S. 92, 23 L. ed. 815.

In California, in accordance with the provisions of the Code, the measure of damages for failure to pay a certificate of deposit is the value of the certificate (which, as has been seen (*ante*, § 256) is taken as against the maker to be the face of the certificate, with due allowance, of course, for exchange). Dollar *v.* International Banking Corp., 10 Cal. App. 791, 109 Pac. 499.

[2] *United States:* Cromwell *v.* County of Sac, 96 U. S. 51, 24 L. ed. 681.

Connecticut: Bissell *v.* Dickerson, 64 Conn. 61, 73, 29 Atl. 226.

Iowa: Sully *v.* Goldsmith, 32 Ia. 397.

Maine: Hobart *v.* Penny, 70 Me. 248.

Maryland: Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

Massachusetts: Woodruff *v.* Hill, 116 Mass. 310.

Ohio: Heller *v.* Meis, 2 Cin. 287; Tod *v.* Wick, 36 Oh. St. 370.

Oregon: Lassas *v.* McCarty, 47 Ore. 474, 84 Pac. 76.

Pennsylvania: Moore *v.* Baird, 30 Pa. 138.

Texas: Denton Lumber Co. *v.* First Nat. Bank, 18 S. W. 962; Petri *v.* First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657, 84 Tex. 212, 20 S. W. 777; First Nat. Bank *v.* Oliver, 16 Tex. Civ. App. 428, 41 S. W. 414.

Washington: McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903.

Wisconsin: Bange *v.* Flint, 25 Wis. 544.

[3] *Connecticut:* Roe *v.* Jerome, 18 Conn. 138 (New York law).

Nebraska: Faulkner *v.* White, 33 Neb. 199, 50 N. W. 328.

New Jersey: Holcomb *v.* Wyckoff, 35 N. J. L. 35, 10 Am. Rep. 219; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158.

New York: Moore *v.* Ryder, 65 N. Y. 438; First Nat. Bank *v.* Haulenbeek, 65 Hun, 54, 19 N. Y. Supp. 567; Perry *v.* Council Bluffs City Waterworks Co., 67 Hun, 456, 22 N. Y. Supp. 151, 51 N. Y. St. 326; Hyman *v.* American Electric Forge Co., 18 Misc. 381, 41 N. Y. Supp. 655.

Tennessee: Oppenheimer *v.* Bank, 97 Tenn. 19, 56 Am. St. Rep. 778, 33 L. R. A. 767, 36 S. W. 705.

[4] *Post*, § 703.

[5] Sanger *v.* Cleveland, 10 Mass. 415; Daggett *v.* Daggett, 8 Cush. 520.

[6] Davis *v.* Elliott, 15 Gray (Mass.), 90.

ment of damages arising out of the transaction in which the note was given.[7]

§ 695a. Partial payment.

Where a payment has been made on the note, the amount of the payment is to be deducted from the face of the note to arrive at the damages.[8] Where the payment was made in goods, the value of the goods at the time and place of payment is deducted, if the parties did not agree on a price.[9] If the note was secured by a mortgage and the mortgage was foreclosed, the price realized at the foreclosure sale, and not the real value of the mortgaged property, is to be deducted, even if it was bought in by the holder of the note.[10] Where the maker of a note had made payments on it, but was entitled to recover them back on the ground of usury, it was held that a surety on the note could not avail himself of the payments.[11]

§ 695b. Application of payments.

The general rule for the application of payments on a note is that a payment will first be applied to the payment of interest,

[7] *California:* Reese *v.* Gordon, 19 Cal. 147.

Illinois: Carpenter *v.* First Nat. Bank, 119 Ill. 352, 10 N. E. 18.

Pennsylvania: Fessler *v.* Love, 43 Pa. 313.

Vermont: Richardson *v.* Sanborn, 33 Vt. 75.

See § 1050.

[8] *Indiana:* Henderson *v.* Reeves, 6 Blackf. 102.

Missouri: Bush *v.* Brandecker, 123 Mo. App. 470, 100 S. W. 48.

Texas: Houston *v.* Morrison, 10 Tex. 1.

Contra, Kentucky, where promissory notes are not negotiable. Phelps *v.* Taylor, 4 J. J. Mon. 170.

[9] Phillips *v.* Commercial Bank, 1 Sm. & M. (Miss.) 636.

[10] West *v.* St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54.

Where mortgaged cattle had been taken in replevin by the mortgagee, but the mortgagor had secured them by giving a bond, and the replevin suit was still undecided, in an action on the note against an indorsee it was held that the amount of recovery would not be reduced on account of the *cattle,* but if finally the plaintiff defaulted and got the cattle or the proceeds of them, the defendant would have a claim on him for that amount. Trower Bros. Co. *v.* Hanson, 110 Fed. 611.

Where a note was transferred to plaintiff in fraud of defendant (the maker), and security was given by the transferor, and after learning of the fraud plaintiff surrendered the security, it was held that he should have kept it, until after notice of the fraud, to protect the defendant, and he was entitled to recover only the amount actually paid by him less the value of the security surrendered. Campbell *v.* Brown, 100 Tenn. 245, 48 S. W. 970.

[11] Savage *v.* Fox, 60 N. H. 17.

and the balance will be applied on the principal.[12] Where several claims exist, it is usually said that a payment, in the absence of directions by the debtor, should be applied to the earliest claim,[13] unless there is an agreement, understanding, or custom to the contrary,[14] which a court is prone to find in favor of the sureties on a preferred claim.[15] There are authorities, however, which in such a case hold that in the absence of directions to the contrary the creditor may apply the payment where he pleases, as to an unsecured as against a secured claim.[16]

§ 695c. Attorney's fees.

Promissory notes often include provisions for an attorney's fee in case of collection by suit. In some States this is held invalid; and in a jurisdiction so holding no such fees can be collected, though the stipulation was valid where made, since the allowance is regarded as contrary to public policy.[17] If the stipulation is allowed, it is not allowed where the fee is unreasonable; but it is usually held that the stipulated fee will be regarded as reasonable in the absence of evidence to the contrary.[18] The fees are to be reckoned upon the entire amount of

[12] *Alabama:* McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548 (statutory).

Missouri: Riney *v.* Hill, 14 Mo. 500, 55 Am. Dec. 119; Call *v.* Moll, 89 Mo. App. 386.

[13] *Alabama:* Stickney *v.* Moore, 108 Ala. 590, 19 So. 76 (*semble*).

Michigan: Grasser & Brand B. Co. *v.* Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389 (where the creditor has not himself made the application).

[14] *Alabama:* Stickney *v.* Moore, 108 Ala. 590, 19 So. 76.

Illinois: Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628.

[15] Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628.

[16] *Michigan:* Grasser & Brand Brewing Co. *v.* Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389 (*semble*).

Rhode Island: Burt *v.* Butterworth, 19 R. I. 127.

[17] Exchange Bank *v.* Appalachian Land & Lumber Co., 128 N. C. 193, 38 S. E. 813.

[18] *Alabama:* Stephenson *v.* Allison, 123 Ala. 439, 26 So. 290.

Indiana: Starnes *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480; Rouyer *v.* Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

New Mexico: Dallas Exch. *v.* Tuttle, 5 N. M. 427, 23 Pac. 241, 7 L. R. A. 445 (unless the stipulated fee is so large as to seem unreasonable on its face).

Texas: Carver *v.* J. S. Mayfield Lumber Co. (Tex. Civ. App.), 68 S. W. 711. [explaining Land, etc., Co. *v.* Robertson (Tex. Civ. App.), 85 S. W. 1020]; Dashiell *v.* Moody (Tex. Civ. App.), 97 S. W. 843.

Contra, that the plaintiff must prove the reasonable fee and can recover only that.

the damages, interest as well as principal.[19] The fee is not due unless the litigation was reasonable;[20] and can be collected only for services in the trial court, not on appeal.[21]

§ 696. Interest.

* In actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is a fixed and arbitrary one. It is identical with the rate of legal interest. The actual damages may be much greater; the non-performance of the obligation may have occasioned the greatest distress, nay, even extreme positive loss; it may have produced actual insolvency. These remote results the law, however, does not investigate.[22] It takes the rate of interest as the measure of damages; and so, says Pothier, "as the different damages which may result from the failure to perform this kind of obligation vary infinitely, and as it is as difficult to foresee as to excuse them, it has been found necessary to regulate them as by a species of penalty, and fix them at a precise sum." [23] **

§ 697. Interest by the civil law.

* With this, the general language of the modern civil law accords. The damages resulting from the non-performance of contracts to pay money are limited to the infliction of interest. "Interest," says Domat,[24] "is the name applied to the compen-

Alabama: Camp *v.* Randle, 81 Ala. 240, 2 So. 287 (of Georgia law).

Minnesota: Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668.

Where the provision is for attorney's fees "up to 10%" it must be proved what the services were and what they were worth. Patillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

[19] *Georgia:* Morgan *v.* Kiser, 105 Ga. 104, 31 S. E. 45.

Texas: Hopkins *v.* Halliburton, 6 Tex. Civ. App. 451, 25 S. W. 1005; Carver *v.* J. S. Mayfield Lumber Co., 29 Tex. Civ. App. 434, 68 S. W. 711.

[20] *Tennessee:* Tyler *v.* Walker, 101 Tenn. 306, 47 S. W. 424 (suit for usurious interest).

If the maker is garnished but does not pay the amount of it into court, he will be liable for the attorney's fee if necessary to collect. Brahan *v.* Clarksville First Nat. Bank, 72 Miss. 266, 16 So. 203.

[21] McCormick *v.* Falls City Bank, 57 Fed. 107.

[22] Lewis *v.* Lee, 15 Ind. 499. See § 622*b*.

[23] Traité des Oblig., part i, ch. ii, art. 3, 170. See Heyman *v.* Landers, 12 Cal. 107.

[24] Liv. iii, tit. v, § 1.

sation which the law gives to the creditor who is entitled to recover a sum of money from his debtor in default." So, too, the Roman law: *In bonæ fidei contractibus usuræ ex morâ debentur.*[25]

These principles, equally recognized by our system, are embodied in the French Code by a positive provision,[26] the correctness of which is thus supported and expounded by one of the ablest commentators on that law:

"It is certain that the non-payment of money when due may cause, and often actually causes, the creditor loss much beyond the legal interest on the sum. For want of the funds on the receipt of which his calculations are made, he may have been compelled to borrow, himself, and to submit to the exactions of the usurer. He may have been prosecuted, in a manner calculated to destroy his credit. He may have been ejected from his property; have become bankrupt; his house may have gone to ruin for want of repair. He may have lost highly advantageous bargains.

"But how are we to distribute these losses according to their real cause, and fix on those which should be imputed to the party in default? How is any equitable valuation to be made of them? Add to this, that the non-payment of money is the most common of all cases which give rise to damages, and we shall perceive that the peace of society would be harassed by this infinite multitude of settlements, and the litigation that would result from them.

"The law prevents this, by declaring that the damages shall never exceed legal interest from the day that payment becomes due; and this, which is a species of forfeiture, may often be advantageous to the creditor.

"Whatever may be the damage that he has suffered by the delay in receiving his funds, whether the debtor was animated by malicious or even fraudulent motives, the creditor cannot, it

[25] L. 32, § 2, Ff. Deusur.; *propter moram.* L. 17, § 3, *in fine eodem.*

[26] *Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts résultants du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts fixés par la loi, sauf les règles particulières au commerce et au cautionnement.*

Ces dommages et intérêts sont dus, sans que le créancier soit tenu de justifier d'aucune perte.

Ils ne sont dus que du jour de la demande, excepté dans les cas où la loi les fait courir de plein droit. Code C., Art. 1153.

is true, demand any other compensation than legal interest on his demand. But, on the other hand, he is not required to prove the damages that the delay may have caused. And this provision, which fixes the measure of damages for non-payment of money at legal interest, is founded on a principle of equity.

"In cases of the non-performance of other contracts, the party in default, as the lessee who violates his contract of letting, or the architect who, by his negligence, causes the destruction of a house, must be fully apprised of the nature of the loss that may result from the non-performance of his duty; whereas with money it is different.

"On the contrary, the engagement to pay a sum of money has no precise relation to any particular damage; it is impossible to know what will result from its non-payment; it is impossible to see what the creditor will lose, or how much he will lose; whether he will be compelled to borrow—whether he will be driven from his house and reduced to bankruptcy—whether his business or his credit will suffer; it is impossible to predict any one event among the thousand which are possible, and which depend upon the situation of the creditor's affairs.

"Money being the common measure of all things, has not, like other things, any peculiar function. It takes the place of all other things. The loss experienced, then, by those who are not paid at maturity is as diversified as the use that they might make of the money, and as unforeseen as the wants from which the injury might arise. They are, in regard to the debtors, like fortuitous cases, impossible to foresee, and which for this reason their obligation does not embrace." [27]

And it should be borne in mind, as Pothier also well remarks, that if, on the one hand, the creditor cannot recover anything beyond the legal interest, so, on the other hand, he is not put to any proof of damage whatever.[28] It is an arbitrary assessment of damages, in the nature of the *Lex Aquilia* of the Roman system. He can, it is true, recover but the legal rate of interest; but then, on the other hand, he might, in fact, not have been

[27] Touillier, vol. vi, liv. 3, tit. 3, ch. iii. *De l'Effet des Obligations*, 230 *et seq.*

[28] So says the civil code of Louisiana, "The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered, he can recover no more." Art. 1935.

able to gain any interest whatever during the time he has been deprived of his funds.**

§ 698. Interest not formerly allowed.

* "It is a dictate of natural justice and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or the common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest." [29] Such is the language of the Supreme Court of the United States; but is to be taken with much allowance. The thunders of the early church [30] were levelled against interest and usury indiscriminately: and up to the time of Henry VIII., as we are told by Lord Mansfield,[31] "all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries."[32] This statute simply provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent by a subsequent statute, passed in the reign of Queen Anne.[33] ** The tendency of enlightened modern opinion is in favor of leaving the whole matter to be regulated by contract, and this has led in England, Massachusetts, and elsewhere to the repeal of the old statutes against usury; the law merely providing a rate to be applied in the absence of express contracts.

§ 699. Now universally allowed.

Interest is now everywhere regarded as the proper measure of damages for the non-payment of bills and notes. In the United States it seems that a jury should be instructed to give

[29] Curtis *v.* Innerarity, 6 How. 146, 154, 12 L. ed. 380.

[30] See Voltaire's article, *Intérêt*, in the Dictionnaire Philosophique, where he represents a Jansenist Abbé remonstrating with a Dutch merchant against taking interest: *Prenez garde; vous vous damnez; l'argent ne peut produire de l'argent—ne peut produire de l'argent: nummus nummum non parit.* The hostility of the church was founded on the prohibition in the Old Testament, "Thou shalt not lend upon usury to thy brother." Deut. xxii, 19, 20.

[31] Lowe *v.* Waller, Doug. 736, 740.

[32] See also Robinson *v.* Bland, 2 Burr. 1077, 1086.

[33] 12 Anne, Stat. 2, c. xvi.

interest, on the same principle on which they are instructed to give the market value of goods or the market price of the hire of an article, for interest is the market price of the hire of the use of money;[34] and that is in fact the rule universally adopted.[35]

§ 700. Foreign bills—Cost of protest and re-exchange.

*In regard to foreign bills of exchange, the general rule is, that the holder of a bill protested for non-payment is entitled to the amount of the bill, re-exchange, and charges.[36]

"Re-exchange," says Mr. Chitty,[37] "is the exchange incurred by the bill being dishonored in a foreign country in which it is payable and returned to the country in which it is made or indorsed, and there taken up. The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he be liable to pay it; but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable." [38]

"By re-exchange," says Mr. Justice Story, "is meant the amount for which a bill can be purchased in the country where the acceptance is made, drawn upon the drawer or indorser, in the country where he resides, which will give the holder of the original bill a sum exactly equal to the amount of that bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with his necessary expenses and interest, for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment." [39]

The question of re-exchange usually arises in regard to the drawers and indorsers; for the acceptor is not, upon non-

[34] See, per Spencer, Senator, Rensselaer Glass Factory *v.* Reid, 5 Cow. 587, 610.

[35] See *ante*, § 301.

[36] *In re* Gillespie, 16 Q. B. D. 702. *Acc.*, Pavenstedt *v.* New York L. I. Co. (N. Y.), 96 N. E. 104.

When necessary, notice of protest may be sent by a special messenger, and the cost recovered. Pearson *v.* Crallan, 2 Smith, 404.

[37] Bills, 684.

[38] See, also, De Tastet *v.* Baring, 11 East, 265, where the origin and principle of the right to redraw is gone into at large. Mellish *v.* Simeon, 2 H. Black. 378, 379; Pollard *v.* Herries, 3 B. & P. 335.

[39] Story on Bills, § 400.

payment of the bill, ordinarily liable to the holder for anything more than the principal sum, and the expenses of the protest, with interest.[40] But if he has expressly or impliedly agreed with the drawer, or with any indorser, for a valuable consideration, to pay the bill at its maturity, and has failed to do so, and the drawer or indorser has been compelled to take up the bill, and pay damages and other expenses necessarily incurred thereby, he may, perhaps, be compellable fully to indemnify the drawer or indorser for all the damage and expense so paid by him, on account of the breach of his contract.[41]

The subject of re-exchange is very differently treated in England and in the United States. The rate which the holder is entitled to recover depends in the former country on the actual course of exchange, as proved at the trial; while in this country, with that leaning to a fixed rule, which we shall have occasion again to notice, when speaking of the subject of insurance, the amount of re-exchange is generally regulated by positive statutory provision.

To obtain a correct appreciation of this branch of our law, it is necessary to consult those treatises which are specially devoted to it; it will be enough here to make a brief examination of a few of the cases which have been decided in this country, and a reference to the statutory provisions of the various States; in making which it should be borne in mind that these statutes have no extra-territorial operation. Thus it has been held in Massachusetts, that the statute of Maine, which enacts, that in an action on a bill of exchange drawn or indorsed in that State, but payable out of it, and protested for non-payment, the holder shall recover three per cent damages in addition to the contents of the bill and interest—does not entitle the holder to recover those damages in a suit against the acceptor in the courts of Massachusetts.[42]

[40] Bowen *v.* Stoddard, 10 Met. 375, 43 Am. Dec. 442; Newman *v.* Goza, 2 La. Ann. 642.

[41] Story on Bills, § 398; Chitty on Bills, part 2, ch. vi, 684 to 687; Woolsey *v.* Crawford, 2 Camp. 445; Napier *v.* Schneider, 12 East, 420; Bayley on Bills, ch. ix, 353; Riggs *v.* Lindsay, 7 Cranch, 500; Bowen *v.* Stoddard, 10 Met. 375; Pothier de Change, 115, 117.

It has been decided in Pennsylvania that the acceptor is not liable for re-exchange. Watt *v.* Riddle, 8 Watts, 545.

[42] Fiske *v.* Foster, 10 Met. 507, 43 Am. Dec. 450.

The desire to establish a fixed rule in the matter of re-exchange manifested itself in this country at an early period of our colonial history. In Pennsylvania, as far back as the year 1700, the legislature enacted, that if any person within that province should draw or indorse any bill of exchange upon any person in England, or other parts of Europe, and the same should be returned unpaid, with a legal protest, the drawer and all concerned should pay the contents of the bill, with *twenty per cent advance for the damage* thereof, in the same specie as the bill was drawn, or current money of that province, equivalent to that which was first paid to the drawer or indorser.[43] So in Massachusetts, the old rule, founded on usage (since modified by the statute), was to allow on all foreign bills drawn on England, and probably also upon any part of Europe, ten per cent as damages in lieu of re-exchange.[44]

In New York, the original usage was to allow twenty per cent damages, in lieu of re-exchange, on all bills drawn on England or any part of Europe. In an action brought in New York, on a bill drawn by the defendant on a Liverpool house, indorsed to the plaintiff, and protested for non-payment, the plaintiff claimed twenty per cent damages and interest, together with two per cent for the difference of exchange, it being two per cent above par when the defendant was notified of the non-payment of the bill. But the claim for this difference was refused, notwithstanding reliance was placed on a usage of the Chamber of Commerce. Spencer, J., said:

"The right to recover damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decision. . . . It is presumed that our rule to allow twenty per cent on the protest of a foreign bill, was originally co-extensive with the rule established in Pennsylvania, and that the same reasons induced both

[43] See Francis *v.* Rucker, Ambler, 672, and Hendricks *v.* Franklin, 4 Johns. 119. In Rhode Island, as early as 1743, an act of similar purport was passed, fixing the damages at *ten per cent.* Brown *v.* Van Braam, 3 Dall. 344, 346, 1 L. ed. 629.

[44] Grimshaw *v.* Bender, 6 Mass. 157, 161, 162. In Maine, the mercantile usage is the same. Wood *v.* Watson, 53 Me. 300. Such a rule of damages established by long usage has the force of law. It must be taken as part of the contract of indorsement, and cannot be changed by the court, whatever monetary crisis may occur.

rules. The twenty per cent was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant fluctuation and uncertainty of exchange."

After saying that the usage of the Chamber of Commerce was too recent to alter the rule of law, he closed by stating:

"In my opinion, the twenty per cent is in lieu of all claims for damages in such cases; and the claim for the difference in the price of the bills cannot be supported, and therefore it must be deducted in this case." [45]

In a subsequent case, however, in the Court of Errors,[46] though the twenty per cent was allowed, the rule in regard to the sum on which it was assessed was altered. The court decided that the holder of a bill of exchange, drawn here on England, and protested there, was entitled to recover the contents of the bill at *the rate of exchange* on England *at the time of the return* of the dishonored bill and notice given to the drawer, and that the twenty per cent damages and interest were to be calculated on this amount, as the principal sum, and not upon the fixed par of exchange. The judgment of the Supreme Court was reversed, but no reasons were assigned.[47]

[45] Hendricks *v.* Franklin, 4 Johns. 119.

[46] Graves *v.* Dash, 12 Johns. 17.

[47] *Acc.*, Denston *v.* Henderson, 13 Johns. 322. But the holder of a bill of exchange remitted to pay an antecedent debt is not entitled to recover the twenty per cent. Kenworthy *v.* Hopkins, 1 Johns. Cas. 108; Thompson *v.* Robertson, 4 Johns. 27. The American Jurist for July, 1829, vol. ii, p. 79, contains an interesting article on the subject of Damages on Bills of Exchange. It states the difference between the system of re-exchange in force in Great Britain and France, and that of arbitrary damages adopted in the United States, and discusses various questions,—whether the European or American system is the best; whether the want of a uniform law on the subject in the different States is an evil; and if so, in what manner it should be redressed. An able report was made on the subject by Mr. Verplanck to the House of Representatives of the United States, in March, 1826, maintaining the right of Congress to control the subject, urging the importance of establishing a uniform rule, and strongly contending for the rule of actual re-exchange as opposed to that of arbitrary damages. "In fact," says the report, "this principle is the only one which can perfectly and under all circumstances and fluctuations of exchange, secure anything like a fair compensation of the loss sustained by the holder of a dishonored bill, without the hazard of one party being sometimes but partially paid or the other oppressed with the payment of unequal and ruinous damages. . . . If this principle be adopted, no valid reason

We have thus far considered the damages and re-exchange on bills protested for non-payment. The same general principles govern the case of bills protested for non-acceptance. "On failure of the performance of the engagement that the drawee will accept," says Mr. Chitty,[48] "the drawer of a bill will immediately, and before the time specified in the bill for payment, be liable to an action, not only for the principal sum, but also in certain cases for interest, re-exchange, and costs, as a consequence of the bill not being honored." This was decided as early as the year 1765,[49] and again by Lord Mansfield,[50] on the ground that what the drawer had undertaken has not been performed, the drawer not having given the credit which was the ground of the contract; and the same point was held in an action by the indorsee against the indorser,[51] each indorser being considered as a new drawer. It had been decided in bankruptcy to the same effect at an earlier day; [52] and the rule in this country is the same.[53] ** In New York, the damages in cases of protest for *non-acceptance* are by statute fixed at the same rate as for non-payment. This was the rule before the statute.[54] In Maine, in the absence of a statutory provision,

appears why arbitrary damages should be added. If provision be made for the substantial fulfilment of the engagement of the seller of the bill, and if he acted in good faith, the requiring any additional sum as a mulct or penalty for the failure of some other person is useless and unjust, and as recent examples in some of our cities have proved, may be of the most dangerous consequences, and overturn the credit of many a fair trader who had made the amplest arrangements to meet all his engagements."

[48] Bills, 194.

[49] Bright *v.* Purrier, Bull. Nisi Prius, 269.

[50] Milford *v.* Mayor, 1 Doug. 54.

[51] Ballingalls *v.* Gloster, 3 East, 481.

[52] Macarty *v.* Barrow, 2 Strange, 949, of which a fuller report is given in Chilton *v.* Whiffin, 3 Wils. 13, 16.

[53] Mason *v.* Franklin, 3 Johns. 202; and again in Weldon *v.* Buck, 4 Johns. 144. In France the rule appears to be different. On the protest for non-acceptance, the obligation of the parties indebted, says Pardessus, Cours de Droit Commercial, part ii, tit. iv, ch. iv, sec. 7, vol. 2, p. 424, is either to pay, to deposit the amount, or to give security. And there are traces of some similar or analogous custom in England. In Bright *v.* Purrier, Bull. N. P. 269, the defendant offered to prove a commercial usage not to pay till protest for *payment;* and in Buller's Nisi Prius, p. 271, it is said: "When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to *give security to answer the same beyond sea,* within double the time the first bill ran for."

[54] See reviser's notes to the 22d section, 1 R. S. 771. The point was expressly decided in Weldon *v.* Buck, 4 Johns. 144; and the same is the rule in England.

damages for protest are not allowed in a suit on a promissory note, though brought by an indorsee against an indorser, and payable in another State.[55] In Kansas, where the general statutes provide that "drawers, indorsers, makers, and obligors" shall be liable for protest charges, it is held that guarantors are not included.[56]

§ 700a. Re-exchange on promissory notes and inland bills.

No allowance for re-exchange is usually made in the case of promissory notes or inland bills in the absence of statute; such allowance is, however, very commonly authorized by statute.[57] Such a statute covers bank checks.[58]

§ 701. Costs of protest and re-exchange, when not allowed.

Costs of protest are not allowable unless protest is necessary to fix the liability of the indorsers.[59] They are not allowed when there are no indorsers,[60] nor unless notice is given to the indorsers.[61] Where a bill of exchange is only nominally a foreign bill, and is sent abroad, not that funds may there be used, but that they may be there obtained and remitted, there can be no recovery of re-exchange.[62]

§ 702. Accommodation paper.

* "In general," says Mr. Chitty, "between the original parties, or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, indorsed, or made the bill or note for the accommodation of the plaintiff, or of one of them, or of a person for whom he is a trustee, who either expressly or impliedly engaged to provide for the bill; or the defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action or reduce the claim." [63] Therefore, where the

[55] Loud *v.* Merrill, 47 Me. 351.

[56] Woolley *v.* Van Volkenburgh, 16 Kan. 20.

[57] *Mississippi:* Buck *v.* Little, 24 Miss. 463.

Pennsylvania: Wood *v.* Kelso, 27 Pa. 241.

[58] German Nat. Bank *v.* Beatrice Nat. Bank, 63 Neb. 246, 88 N. W. 480.

[59] Woolley *v.* Van Volkenburgh, 16 Kan. 20.

[60] Cramer *v.* Eagle M. Co., 23 Kan. 399.

[61] Curtis *v.* Buckley, 14 Kan. 449.

[62] Willans *v.* Ayers, 3 App. Cas. 133.

[63] Chitty on Bills, 70.

defendant accepted the bill for the accommodation of the plaintiff, except as to a part; and where the plaintiff, as indorsee, had only advanced a part of the money made payable by the bill accepted for the indorser's accommodation, neither was allowed to recover more than he had advanced.[64] But as against any other party the accommodation maker is of course obliged to pay the full amount, even if the real principal has been discharged in whole or in part.[65] But the consideration of this subject, in truth, appertains more properly to the right of recovery than to the measure of damages.**

§ 703. Pledged paper.

The pledgee of negotiable paper generally recovers the whole amount at maturity.[66] But if the defendant had a valid defence against the pledgor, recovery can be only for the amount of the plaintiff's interest.[67] So where the note was given originally to secure the defendant's debt, the measure of recovery in an action by the maker is the amount of the debt secured;[68] and the same is true where the plaintiff is an indorsee with notice.[69] So an insurance company can recover upon a premium note only the premiums already earned.[70] And the *bona fide* holder of fraudulently issued warehouse receipts (if the issuer is es-

[64] Darnell *v.* Williams, 2 Stark. 166; Wiffen *v.* Roberts, 1 Esp. 261.

But where the defendant made a note to the plaintiff's order and the plaintiff indorsed it for the defendant's accommodation, who negotiated it, the plaintiff, having taken up the note at its maturity by paying half its face value, was allowed to recover the whole face value. Fowler *v.* Strickland, 107 Mass. 552. The plaintiff in other words was treated as an ordinary purchaser of the note.

[65] Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488.

[66] Reid *v.* Furnival, 1 C. & M. 538.

[67] *United States:* Cromwell *v.* County of Sac, 96 U. S. 60, 24 L. ed. 681.

Illinois: Steere *v.* Benson, 2 Bradw. 560.

Massachusetts: Fisher *v.* Fisher, 98 Mass. 303.

Minnesota: St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

New Jersey: Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

[68] *California:* Vogan *v.* Caminetti, 65 Cal. 438.

New York: Williams *v.* Smith, 2 Hill, 301; Rogers *v.* Smith, 47 N. Y. 324, 7 Am. Rep. 450.

Pennsylvania: Davis *v.* Funk, 39 Pa. 243, 80 Am. Dec. 519.

Wisconsin: Union Nat. Bank *v.* Roberts, 45 Wis. 373.

[69] Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368.

[70] Maine M. M. Ins. Co. *v.* Farrar, 66 Me. 133; Maine M. M. Ins. Co. *v.* Stockwell, 67 Me. 382.

topped to deny their validity) recovers the amount of the loan they were issued to secure and not their face value.[71]

§ 704. Measure of liability of an indorser.

In an action by the indorsee against the indorser of a promissory note, the measure of damages is the amount paid by the indorsee, with interest, subject to the limitation that the recovery must not exceed the sum due on the face of the note.[72] So also where the law permits the assignment of a non-negotiable promissory note, and owing to the insolvency of the maker, or other sufficient cause, the assignee has failed to recover the amount from him; in an action against the assignor, the measure of the assignee's damages is the amount of the consideration paid by him and interest.[73] So where a claim on the government had been assigned for a valuable consideration, but was not paid in consequence of its having been paid before under an authority previously given by the assignor, the assignee was held entitled to recover only the consideration paid with interest from the time of presenting the claim to the government.[74] The amount paid by the indorsee or assignee is, however, presumably the face value of the note.[75]

This rule rests upon the ground that the consideration for the payment of the purchase-money by the indorsee or assignee

[71] Corn Exchange Bank *v.* American D. & T. Co., 163 N. Y. 332, 57 N. E. 477.

[72] *United States: In re* Many, 17 N. B. R. 514.

Alabama: Cook *v.* Cockrill, 1 Stew. 475, 18 Am. Dec. 67; Hutchins *v.* McCann, 7 Port. 94; Noble *v.* Walker, 32 Ala. 456.

Georgia: Bethune *v.* McCrary, 8 Ga. 114.

Illinois: Hawkinson *v.* Olson, 48 Ill. 277; Shaeffer *v.* Hodges, 54 Ill. 337; Short *v.* Coffeen, 76 Ill. 245, 20 Am. Rep. 243.

Maine: French *v.* Grindle, 15 Me. 163.

New York: Braman *v.* Hess, 13 Johns. 52; Munn *v.* Commission Co., 15 Johns. 43. But *contra*, Watson *v.* Hahn, 1 Colo. 385; Cook *v.* Clark, 4 E. D. Smith, 213.

[73] *Arkansas:* Jones *v.* State, 40 Ark. 344 (*semble*).

Colorado: Jones *v.* Hayden, 3 Colo. App. 305, 33 Pac. 76 (county warrant).

Indiana: Foust *v.* Gregg, 68 Ind. 399; Schmied *v.* Frank, 86 Ind. 250.

Kentucky: Davis *v.* Harrison, 2 J. J. Marsh. 189.

Missouri: Muldrow *v.* Agnew, 11 Mo. 616; Whisler *v.* Bragg, 31 Mo. 124.

West Virginia: Goff *v.* Miller, 41 W. Va. 683, 24 S. E. 643, 56 Am. St. Rep. 886.

[74] Eaton *v.* Mellus, 7 Gray, 566.

[75] Foust *v.* Gregg, 68 Ind. 399; Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454.

has failed, and the amount of it is therefore the measure of recovery. The reasoning does not apply to the case of an accommodation indorser, and the whole face value of the instrument may therefore be recovered from him.[76]

§ 705. Costs of prior suits.

* Some other decisions have been made upon the subject of the amount of recovery, which it may be proper to notice. An indorser who is sued on his indorsement, and subjected to costs, cannot recover those costs against the maker. He can only have the amount of the note and interest;[77] because, says the Supreme Court of New York, "if the indorser of a note be duly fixed, he ought to pay it without being sued; but if he finds it more convenient to delay taking up the note until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. . . . The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser. There must be a special promise to save harmless before the payee can call upon the drawer for costs accrued by the default of the payee (indorser) himself." In a suit against the indorser, the fees of protest are a proper charge.[78] And an indorser who has paid the note can, it seems, recover the costs of protest against the maker.[79]

On the same principle, it has been held, in England, where an accommodation acceptor was sued by a *bona fide* holder, that as he ought to have paid it when demanded, he could not recover the costs against the party who had improperly indorsed it to the holder.[80] So, also, the acceptor of a bill with funds who has failed to pay, is not liable for the costs of a suit against the drawer.[81] And the indorser of a bill is not liable for the costs of a suit by the holder against the acceptor, nor for commissions

[76] Ingalls *v.* Lee, 9 Barb. 647.

[77] *Missouri:* Fenn *v.* Dugdale, 31 Mo. 580.

New York: Simpson *v.* Griffin, 9 Johns. 131.

South Carolina: Steele *v.* Sawyer, 2 McCord, 459; Richardson *v.* Presnall, 1 McCord, 192.

[78] Merritt *v.* Benton, 10 Wend. 116.

[79] Morgan *v.* Reintzel, 7 Cranch, 273.

[80] Bleaden *v.* Charles, 7 Bing. 246. See this case commented on in Asprey *v.* Levy, 16 M. & W. 851; Roach *v.* Thompson, M. & M. 487.

[81] Barnwell *v.* Mitchell, 3 Conn. 101.

paid on the collection of the money.[82] In like manner the indorser of a regular bill who has been sued by an indorsee, is not entitled to recover from the acceptor his costs in such action.[83] But a party who makes or indorses or accepts an accommodation bill or note is regarded as a surety, and can charge the party for whose benefit his signature is given with the costs of a suit for the collection of such note or bill if he be compelled to pay it. So the accommodation acceptor of a bill who is sued, can recover his costs of the drawer.[84] And so it has been held between the accommodation indorser of a note and the maker.[85]**

Where an indorsee of a promissory note sues the maker, who defends on account of failure of consideration, and after notice the indorser does not take up the case, and the indorsee continues it, it is held that he may recover of the indorser the costs and expenses of the suit.[86]

§ 706.[a] Indorser's damages.

An indorser being a surety for the maker, his position cannot be altered by the holder, without the latter's making himself liable. Thus when the holder of an indorsed note exchanged collateral security held to secure the note without the indorser's consent, the measure of the latter's damages was held to be the difference in value between the original and the substituted security.[87]

§ 707. Damages for failure to accept or pay.

We have seen that for breach of a *promise to pay* money, the face of the paper furnishes the measure of damages. But the rule is otherwise if the contract is a contract to accept or pay in the future. Here the plaintiff can recover substantial damages.[88] In Boyd *v.* Fitt,[89] the defendant failed to meet a draft

[a] For § 706 of the eighth ed., see chap. lix.

[82] Bangor Bank *v.* Hook, 5 Me. 174. [disapproved in Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213].

[83] Dawson *v.* Morgan, 9 B. & C. 618.

[84] Jones *v.* Brooke, 4 Taunt. 464.

[85] Hubbly *v.* Brown, 16 Johns. 70; Baker *v.* Martin, 3 Barb. 634; and see *post*, chap. xxxvi, Of Contracts of Indemnity.

[86] Daskam *v.* Ullman, 74 Wis. 474, 43 N. W. 321.

[87] Nelson *v.* First Nat. Bank, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425.

[88] Marzetti *v.* Wiliams, 1 B. & A. 415; Rolin *v.* Steward, 14 C. B. 595.

[89] 14 Ir. C. L. 43.

of the plaintiffs, whereby the plaintiffs' business in Glasgow was suspended, their business in Dublin much injured, and they lost the agency of an Australian firm. The jury having given damages on each of these three heads, the verdict was sustained, the court holding that the suspension of the Glasgow trade was within both branches of the rule in Hadley *v.* Baxendale, and that the damages sustained under the other two heads of loss were within the rule in Rolin *v.* Steward,[90] the natural result of the defendant's breach of contract. The extent of these damages it was for the jury to determine. In Prehn *v.* Royal Bank of Liverpool [91] the defendants, bankers at Liverpool, had agreed to accept the drafts of bankers at Alexandria. The defendants notified the plaintiffs that they could not meet their engagements. The latter were allowed to recover the commission they were obliged to pay another house to take up their bills, and also the expense of protesting the bills at Liverpool and Alexandria, and the expense of telegrams which they had despatched. In Larios *v.* Bonany y Gurety,[92] a case appealed from the Supreme Court of Gibraltar, the plaintiffs had been allowed in that court to recover for the defendant's failure to accept a draft: 1. The expense of protest; 2. Loss on some pork which he had been obliged to sell to get money; 3. Expenses of journeys to the place of trial, and expenses while at the trial; 4. General damages for injury to his personal credit, and for other loss. On appeal it was held that the plaintiff could not recover item 2, because that was too remote, such loss not being a natural consequence of the breach of contract. He was not allowed to recover item 3, for costs are a full indemnity. He was, however, allowed to recover items 1 and 4.[93] In Isley *v.* Jones,[94] an action for failure to accept a draft for the plaintiff's accommodation, it was held that the measure of damages was the inconvenience and loss which the plaintiff sustained from the defendant's offer to accept, and failure to do so.

§ 708. Damages in cases of fraud and estoppel.

In an action by the maker of a negotiable promissory note,

[90] 14 C. B. 595.
[91] L. R. 5 Ex. 92.
[92] L. R. 5 P. C. 346.
[93] *Acc.*, Urquhart *v.* McIver, 4 Johns (N. Y.) 103.
[94] 12 Gray (Mass.), 260.

against one who has wrongfully negotiated it, so as to render the maker liable upon it, the measure of damages is the amount of the note, and proof that the plaintiff has already paid the note is unnecessary.[95] So where defendant, as plaintiff's agent, wrongfully issued bonds of the plaintiff, the market value of the securities could not be shown. The defendant was, however, allowed to show the plaintiff's inability to pay the bonds.[96] In an action to recover the damages sustained by the plaintiff by the act of the defendant in fraudulently transferring to him a promissory note, as a valid and subsisting demand, when it had been in fact previously paid and cancelled, the measure of damages is, *prima facie*, the amount of the note and interest. The ability of the maker to pay the note will be presumed, until the contrary is proved.[97] Where one is estopped from denying his signature to a note, as where he has adopted the signature knowing it to be a forgery, the general rule will apply, and the measure of the damages will be the whole amount of the note.[98]

[95] Decker *v.* Mathews, 12 N. Y. 313.

[96] Western R. R. *v.* Bayne, 75 N. Y. 1.

[97] *Indiana:* Foust *v.* Gregg, 68 Ind. 399.

New York: Neff *v.* Clute, 12 Barb. 466.

[98] Casco Bank *v.* Keene, 53 Me. 103; so in case of the signature of an indorser. Fall River Nat. Bank *v.* Buffinton, 97 Mass. 498.

CHAPTER XXXIV

CONTRACTS OF INSURANCE

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I.—Marine Insurance

§ 709.—Marine insurance a contract of indemnity.

* Marine insurance is defined to be a "contract of indemnity in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or implied in the policy, during a certain voyage or period of time."[1] ** The more com-

[1] Duer on Marine Insurance, vol. i, p. 58; Hamilton *v.* Mendes, 2 Burr, 1198, 1210.

mon subjects of such policies are the vessel outfits, the cargo, freight, and profits.

* In England this contract retains more nearly its original and proper character as a contract of indemnity measured by the actual loss; but in the United States it has been very materially modified by the introduction of various arbitrary rules, among which the most prominent are the deduction of "one-third new for old," [2] the doctrine of abandonment for constructive total loss, and the principles adopted in the settlement of general averages. There is no branch of the law in which the rule of compensation has been made so much to yield to that of arbitrary remuneration, if it may be so called—in other words, the principle analogous to that of the *Lex Aquilia* of the Roman law, by which, instead of an inquiry into the exact circumstances of the particular case, a fixed rate or proportion is determined by which the recovery in all instances is governed.

The losses for which the insurer becomes liable fall under one of these three heads: partial loss; total loss; or general average.**

§ 710. Total loss.

* A total loss occurs where the thing insured is physically destroyed or rendered valueless; [3] or where, under the doctrine of constructive losses, the deterioration is so great as to authorize the insured to abandon to the underwriters and demand payment as for an actual physical total loss.**

In some of the early cases *actual destruction* was said to be necessary to enable the insured to recover for a total loss; [4] but the rule now is as just stated. Hence where a vessel is so damaged by perils insured against that its sale by the master is justifiable there is a total loss without abandonment.[5] So, if goods are by perils of the sea reduced to such a condition that they cannot be restored to the assured in their original char-

[2] This is, however, common to the English system.

[3] *United States:* Insurance Co. *v.* Fogarty, 19 Wall. 640, 22 L. ed. 216.

New York: Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664.

[4] *New York:* Depeyster *v.* Sun M. I. Co., 17 Barb. 306.

England: Navone *v.* Haddon, 9 C. B. 30.

[5] *Maine:* Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55.

Maryland: Mutual Safety Ins. Co. *v.* Cohen, 3 Gill 459, 43 Am. Dec. 341.

New York: McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505.

acter, at the original place of their destination, this is a total loss of cargo.[6] So too, where, though the goods arrive in specie, they are so damaged as to be unmerchantable in their original character, there is a total loss.[7]

It would seem to follow that if the cargo cannot be carried to its destination in merchantable condition there is a total loss of freight.[8] But it is generally held that if the goods can be carried in specie there can be no recovery for a total loss of freight though the goods when so carried would be valueless.[9] The rule applies though the goods are surrendered to the shipper or abandoned by him as a total loss.[10] Where the vessel is a total loss and no freight *pro rata itineris* has been earned and expense of forwarding cargo on another vessel equals or exceeds the whole amount agreed upon there can be recovery for total loss of freight without abandonment.[11]

Where there is an entire loss of any separate part of the cargo there is a total loss of that portion of the cargo; so where a number of mules were insured, and some of them were lost, the recovery was for a total loss of that portion of the property insured, and the case being that of a valued policy the recovery was of a proportionate amount of the whole valuation.[12]

§ 711. Constructive total loss.

Where there is not an actual total loss it has been settled that in many cases the assured may abandon to the underwriters

[6] Navone *v.* Haddon, 9 C. B. 30; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges, 219, 7 L. J. Exch. 328, 4 Scott, 1, 32 E. C. L. 130.

[7] Asfar *v.* Blumdell, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. (N. S.) 648, 44 Wkly. Rep. 130; Parry *v.* Aberdeen, 9 B. & C. 411, 7 L. J. K. B. O. S. 260, 4 M. & R. 343, 17 E. C. L. 189. But see Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455.

[8] See Asfar *v.* Blumdell, *supra*.

[9] *United States:* Jordan *v.* Warren Ins. Co., 1 Story, 342, 13 Fed. Cas. No. 7,524.

Massachusetts: Lord *v.* Neptune Ins. Co., 10 Gray 109.

[10] *Maryland:* Merchants' M. I. Co. *v.* Butler, 20 Md. 41.

New York: Griswold *v.* New York I. Co., 3 Johns. 321, 3 Am. Dec. 490.

[11] *New York:* Robertson *v.* Atlantic M. I. Co., 68 N. Y. 192.

England: Trinder *v.* Thames M. I. Co., 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. (N. S.) 485, 46 Wkly. Rep. 561.

[12] *Louisiana:* Brooke *v.* Louisiana S. I. Co., 16 Mart. 640, 681.

New York: Harris *v.* Eagle Fire Co., 5 Johns. 368.

England: Wilkinson *v.* Hyde, 3 C. B. (N. S.) 30, 4 Jur. (N. S.) 482, 27 L. J. C. P. 116, 91 E. C. L. 30.

and claim payment of the sum insured. A constructive total loss is one which as a matter of physical fact is but partial, but which as a matter of law gives the assured an option to treat it as total. The doctrine was not introduced into the law of insurance until long after the contract was familiarly known to commerce and is very differently applied in different countries.

Capture is everywhere treated as constructive total loss necessitating abandonment. By the American authorities the fact that the vessel is released after the abandonment will not defeat the recovery for a technical total loss.[13] The English rule seems otherwise.[14] If the vessel was in fact released or recaptured at the time of abandonment, there can be recovery for partial loss only, although the assured was ignorant of the rescue.[15]

In the United States wherever the thing insured is damaged by a peril insured against, more than half its value, the assured can abandon to the underwriters and claim a total loss. Instead of compensation for the actual damage sustained he may recover the whole value of his interest at risk. Thus, when perils of the sea have caused a deterioration of cargo exceeding half its value or when the expense of salvage would exceed that amount, there is a constructive total loss,[16] but a total loss of a distinct portion of the cargo amounting to more than half is not a constructive total loss of the whole.[17] In determining whether or not the cost of repairing a vessel amounts to half its value, the actual value of the vessel at the port of repairs and

[13] *United States:* Rhinelander *v.* Pennsylvania Ins. Co., 4 Cranch, 29, 2 L. ed. 540.

New York: Bordes *v.* Hallet, 1 Cai. 444.

Pennsylvania: Dutilh *v.* Gatliff, 4 Dall. 446, 1 L. ed. 903.

[14] Brotherston *v.* Barber, 5 M. & S. 418, 17 Rev. Rep. 378. But *cf.* Ruys *v.* Royal Exch. Assur. Corp., 8 Aspin. 294, 66 L. J. Q. B. 534, 77 L. T. Rep. (N. S.) 23; Bainbridge *v.* Nielson, 1 Camp. 237, 10 East, 329, 10 Rev. Rep. 316.

[15] *United States:* Marshall *v.* Delaware Ins. Co., 4 Cranch, 202, 2 L. ed. 596 (but *contra*, Rumford *v.* Church, 1 Johns. Cas. 147).

New York: Church *v.* Bedient, 1 Cai. Cas. 21.

[16] *Michigan:* Harvey *v.* Detroit F. & M. I. Co., 120 Mich. 501, 79 N. W. 898.

New York: Devitt *v.* Providence Washington Ins. Co., 61 App. Div. 390, 70 N. Y. Supp. 654.

South Carolina: Mordecai *v.* Fireman's Ins. Co., 12 Rich. 512.

[17] *United States:* Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675.

Massachusetts: Forbes *v.* Manf. Ins. Co., 1 Gray, 371.

not its value at destination or the valuation in the policy is the basis of calculation.[18] But the policy may make the agreed valuation the criterion.[19] The cost to be estimated is what it would take to repair the vessel completely, not merely what it would take to make her seaworthy.[20] The cost of getting a stranded vessel off a beach and to a place of safety [21] and the cost of temporary repairs at the port of necessity are to be added to the probable expense of additional repairs at the port where the vessel would be repaired in full.[22] Items of general average cannot be included in estimating the amount of loss, nor expenses of ascertaining the extent of loss, nor wages and provisions of crew while the ship is undergoing repairs.[23] The amount due the shipowner in contribution for general average from owners of freight and cargo must be deducted from the cost of repairs.[24] By weight of authority the rule of a deduction of one-third new for old is not applied.[25] That the unfitness of a vessel to be repaired is partly due to previous defective condition is no ground of deduction in computing the degree of injury.[26] If at the time the abandonment was made it reasonably seemed that the vessel could not be saved for less than half its value, the fact that it was subsequently saved and repaired for a less sum will not reduce the amount of recovery to that for partial loss.[27]

[18] *United States:* Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Peabody Ins. Co. *v.* Memphis Packet Co., 5 Am. L. Rec. 499 (*contra*, Howell *v.* Phila. M. I. Co., 12 Fed. Cas. No. 6,781).

New York: American Ins. Co. *v.* Ogden, 20 Wend. 287.

[19] Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

[20] Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.), 22.

[21] Young *v.* Union Ins. Co., 24 Fed. 279.

[22] American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45.

[23] Hall *v.* Ocean Ins. Co., 21 Pick. 472, 32 Am. Dec. 271.

[24] Pezant *v.* National Ins. Co., 15 Wend. (N. Y.) 453.

[25] *United States:* Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66; Memphis Packet Co. *v.* Peabody Ins. Co., 1 Cinc. L. Bul. 42.

Contra, Massachusetts: Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271; Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 28 Am. Dec. 245.

New York: Center *v.* American Ins. Co., 7 Cow. 564; Murray *v.* Great Western Co., 75 Hun, 282, 25 N. Y. Supp. 414.

[26] Taber *v.* China M. I. Co., 131 Mass. 239.

[27] *United States:* Orient M. I. Co. *v.* Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. ed. 63.

Illinois: Norton *v.* Lexington F. I. Co., 16 Ill. 235.

There is a constructive total loss of profits when more than half in value of the subject has been lost.[28]

The American rule in modified form prevails in France and generally on the continent, but the English rule firmly maintains the more salutary doctrine that no abandonment can be sustained unless the thing is injured to its full value.

Abandonment must be made within a reasonable time after notice of loss and must state the true cause thereof. If the underwriter does not seasonably reject the abandonment, he will be taken to have accepted. If abandonment is accepted it is immaterial that the loss does not exceed fifty per cent of the value and recovery is not thereby reduced to that for partial loss.[29] If abandonment is justifiably rejected, but the underwriter takes the vessel to repair her and fails to return her in a reasonable time properly repaired, there can be recovery for constructive total loss;[30] but where the vessel is so repaired and returned, acceptance by assured does not bar recovery for subsequently discovered deficiencies in her repairs as a partial loss.[31]

After abandonment is accepted the property is that of the underwriter who is liable for all expenses connected therewith and entitled to all proceeds arising therefrom.

§ 712. Measure of loss on open policy.

The measure of loss on an open marine policy is the actual value of the property lost. Thus where an insured vessel is lost, the value and not the cost of the vessel is recoverable;[32] and where the market value was depressed through temporary causes it was held that the jury was not restricted to such market value, but might find a higher actual value.[33] But where the owner of the vessel is also the owner of the cargo any amount due from the cargo as general average must be

Kentucky: Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176.

[28] Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139.

[29] Northwestern Transp. Co. *v.* Thames, etc., Ins. Co., 59 Mich. 214, 26 N. W. 336.

[30] Copelin *v.* Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504.

[31] Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727.

[32] Snell *v.* Delaware Ins. Co., 4 Dall. 430, 1 L. ed. 896.

[33] McCuaig *v.* Quaker City Ins. Co., 18 Up. Can. Q. B. 130.

deducted from the loss on the ship.[34] In arriving at the value of a cargo, the insurance premium, commissions and charges are to be added to the invoice price at the loading port.[35] The value at the place of destination is not the criterion.[36] Under an open policy on freight the measure of recovery is the gross amount to be received on the bill of lading without deducting expenses,[37] and where the owner of the vessel himself supplies the cargo the recovery in a policy on freight is the amount he might have obtained under the usual rate of freight on the voyage at the port of departure.[38]

The recovery upon an open policy is not restricted to the actual value of the property lost; the owner may also recover the necessary expenses of laboring for the safety and recovery of the vessel.[39] Where a vessel meets with a partial loss, is repaired, proceeds on her voyage, and meets with a total loss, not only the value of the vessel, but also the expense of the repairs may be recovered, even though the amount of both losses will exceed the amount named in the policy.[40] A general custom to pay the gross and not the net amount of freight on an open policy has been held good, though it affords more than complete indemnity.[41] A statement of the amount of loss in the proofs of loss does not estop the assured from claiming a larger amount.[42]

[34] Potter *v.* Providence Washington Ins. Co., 19 Fed. Cas. No. 11,336, 4 Mason, 298.

[35] *Kentucky:* Louisville M. & F. I. Co. *v.* Bland, 9 Dana, 143, 157.

New York: Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

England: Usher *v.* Noble, 12 East 639.

Contra, Massachusetts: Warren *v.* Franklin Ins. Co., 104 Mass. 518, 6 Am. Rep. 261 (market value at inception of risk).

[36] Wolf *v.* National M. & F. I. Co., 20 La. Ann. 583.

[37] Lockwood *v.* Atlantic M. I. Co., 47 Mo. 50.

[38] Paradise *v.* Sun M. I. Co., 6 La. Ann. 596.

[39] McBride *v.* Marine Ins. Co., 7 Johns. 431; as, in case of a captured vessel, legal expenses in the prize courts, Lawrence *v.* Van Horne, 1 Cai. 276, or expenses of travel to obtain release of property, Watson *v.* Marine Ins. Co., 7 Johns. 57.

[40] *United States:* Christie *v.* Buckeye Ins. Co., 5 Fed. Cas. No. 2,700.

Massachusetts: Matheson *v.* Equitable Mar. Ins. Co., 118 Mass. 209, 19 Am. Rep. 441.

England: Le Cheminant *v.* Pearson, 4 Taunt. 367.

[41] Palmer *v.* Blackburn, 1 Bing. 61.

[42] American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399.

§ 712a. Recovery by owner of a limited interest.

Where the pecuniary value of a limited interest cannot be precisely determined, the owner of such an interest may recover the full value of the property under a marine policy thereon. Thus an unpaid vendor may recover the value of the vessel, not being limited to the price at which he contracted to sell,[43] and a mortgagor's interest is not restricted to such proportion of the value of the vessel as the surplus after paying the debt bears to the whole.[44] But when the value of the interest can be accurately measured, the rule is otherwise. The recovery of a mortgagee is limited to the amount of the debt,[45] and that of a part owner to the value of his interest,[46] or where the policy is valued such proportion of the valuation as his interest bears to the whole actual value.[47]

§ 713. Valued policy.

The open marine policy has been almost superseded by the valued policy, in which the amount to be paid upon total loss is liquidated.[48] The agreed valuation is recovered upon a total loss, notwithstanding the market value has risen or fallen between the valuation and the loss,[49] or that after the issuance of the policy but before total loss the insured vessel was greatly damaged by a peril not insured against.[50] Where a carrier insures its liability on cargo under a valued policy, the measure of the insurer's liability is the face of the policy irrespective of the amount paid by the shipowners to the owners of the cargo.[51] But if the overvaluation is fraudulent the policy is voidable.[52]

[43] Stuart *v.* Columbia Ins. Co., 2 Cranch C. C. 442.

[44] Lazarus *v.* Com. Ins. Co., 19 Pick. (Mass.) 81.

[45] Irving *v.* Richardson, 1 M. & R. 153.

[46] Hebner *v.* Sun Ins. Co., 157 Ill. 144, 41 N. E. 627.

[47] *Massachusetts:* Finney *v.* Warren Ins. Co., 1 Met. 16, 35 Am. Dec. 343.

Ohio: Knight *v.* Eureka Ins. Co., 26 Oh. St. 664, 20 Am. Rep. 778.

[48] "A 'valued policy' is not understood to be one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of a loss." Agnew, J., in Lycoming Ins. Co. *v.* Mitchell, 48 Pa. 367, 372.

[49] Portsmouth Ins. Co. *v.* Brazee, 16 Oh. 81.

[50] Woodside *v.* Globe M. I. Co., 8 Aspin. 118, 65 L. J. Q. B. 117, 73 L. T. Rep. (N. S.) 626, 44 Wkly. Rep. 187.

[51] Ursula I. Co. *v.* Amsinck, 115 Fed. 242.

[52] *New York:* Voisin *v.* Commercial Mut. Ins. Co., 62 Hun, 4, 16 N. Y. Supp. 419.

Where there is a valued policy on profits, loss of the cargo entitles the assured to the amount of the policy without proof that some profits would have arisen.[53] A valued policy on freight at and from A to B and at and from B back to A covers freight to the full amount of the valuation on both outward and homeward voyages, and where the cargo is a total loss on the homeward voyage the full valuation is recoverable without deduction for freight earned on the outward voyage.[54] Nor are the expenses of completing the voyage to be deducted.[55] In case of a valued policy upon cargo or freight, there is sometimes a total loss before the cargo has been entirely loaded, or after part has been discharged. Where a valued policy is issued on cargo it has finally been decided to mean that cargo which the vessel is intended to carry, not such goods as may form the whole load at a particular moment; consequently when a total loss happens after part of the cargo has been taken on or discharged the valuation is not recoverable, but only such proportion thereof as the value of the cargo loaded bears to that intended to be covered by the valuation.[56] So where there is a valued insurance on freight, and only part of the cargo has been taken on at the time of loss, there will be a *pro rata* recovery though it be proved that a full return cargo would have been secured.[57] The same rule applies to insurance upon profits.[58]

England: Haigh *v.* De la Cour, 3 Campb. 319, 13 Rev. Rep. 813.

[53] Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 7 L. ed. 659.

[54] Davy *v.* Hallett, 3 Cai. 16, 2 Am. Dec. 241; Insurance Co. *v.* Mordecai, 22 How. 111, 16 L. ed. 329.

[55] Lockwood *v.* Atlantic M. I. Co., 47 Mo. 50.

[56] Tobin *v.* Harford, 13 C. B. (N. S.) 791, 17 C. B. N. S. 528, overruling Shawe *v.* Felton, 2 East, 109. *Cf.* Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429 (valuation excluded goods not covered by policy).

In Voisin *v.* Providence Washington Ins. Co., 51 App. Div. 553, 65 N. Y. Supp. 333, the master of the vessel and the consignor conspired to issue bills of lading for an amount of goods greater than was shipped. A purchaser of the bill of lading insured the goods under a valued policy. *Held*, that recovery is limited to that proportion of the valuation which the amount of goods actually shipped bore to that represented to have been shipped and forming the basis of valuation).

[57] Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. (N. S.) 884; Forbes *v.* Aspinall, 13 East, 323. But the court added that the valuation could have been recovered if the whole cargo had been shipped, though the voyage had not yet begun.

[58] Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451.

§ 714. Partial loss.

Partial loss is, as its name implies, a partial destruction of the thing insured. In adjusting a partial loss on goods, the ratio of deterioration is estimated by the relative value of sound and damaged goods at the port of delivery. This ratio, in case of an open policy, is then applied to the invoice price of the goods at the port of lading without reference to the rise and fall of the market.[59] A proportionate amount of the premium is also to be included.[60] Under a valued policy the recovery should be that fraction of the agreed valuation proportionate to the depreciation,[61] but there are decisions that a valued policy is opened where the loss is partial.[62] Return duties received by the owners of the goods from the customhouse should not be deducted from the amount to which the insurers are to contribute.[63]

Where the insured vessel is so strained that repairs do not put her in her original condition, the insurer is liable for the diminution in value as well as for expenses of repairs.[64] But where a total loss occurs by an excepted peril, there can be no recovery for repairs necessitated by a previous partial loss within the policy if such repairs have not yet been made.[65] There can be no recovery for expenses of the crew during delay of the vessel for repairs, nor for commissions paid to secure an advance for repairs.[66]

It is a rule peculiar to marine insurance that where the

[59] *New York:* Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217.

England: Usher *v.* Noble, 12 East, 639.

[60] Louisville M. & F. I. Co. *v.* Bland, 9 Dana (Ky.), 143.

[61] *United States:* Griswold *v.* Union Mut. Ins. Co., 11 Fed. Cas. No. 5,840, 3 Blatchf. 231.

England: Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. (N. S.) 863, 30 Wkly. Rep. 906; Lewis *v.* Rucker, 2 Burr. 1167.

[62] *United States:* Watson *v.* Insurance Co. of N. Am., 29 Fed. Cas. No. 17,286, 3 Wash. 1.

Massachusetts: Clark *v.* United M. & F. Co., 7 Mass. 365, 5 Am. Dec. 50. [But *cf.* Fay *v.* Alliance Ins. Co., 16 Gray, 455, 77 Am. Dec. 419, valued policy on freight].

[63] Cory *v.* Boylston Ins. Co., 107 Mass. 140, 9 Am. Rep. 14.

[64] *Maine:* Hagar *v.* Eng. M. M. I. Co., 59 Me. 460, 8 Am. Rep. 428.

Massachusetts: Giles *v.* Eagle Ins. Co., 2 Met. 140.

[65] Livie *v.* Janson, 12 East, 648, 11 Rev. Rep. 513.

[66] *Ohio:* Webb *v.* Protection Ins. Co., 6 Ohio, 456.

England: Shelbourne *v.* Law Investment & Ins. Corp., [1898] 2 Q. B. 626.

actual or agreed value of the subject-matter of the policy exceeds the total amount of insurance, the assured is a coinsurer as to such uninsured part. Hence any underwriter is liable only for such proportion of the loss as the amount subscribed bears to the value of the interest covered.[67] But upon an open policy the whole amount of the risk may be recovered upon a partial loss, if the actual loss reaches that amount.[68]

§ 715. One-third new for old.

* In regard to partial losses, the allowance of *one-third new for old* is the most important arbitrary limitation of the amount of relief which usage has engrafted on the policy. In case of a partial loss on the ship, the underwriters are nominally liable on the face of their contract to pay for the actual damage sustained. But it is considered that where old timbers or other materials are replaced by new, the vessel, when repaired, is better than she was before the damage was sustained. And, accordingly, it is held that the assured must himself bear a part of the expense of the repairs.[69] Mr. Justice Story has said that if the difference between the value of the vessel before the damage and after the repairs, "were to be ascertained in every particular case by actual inspection and estimates, there would be no end to controversies; and, therefore, general usage, which the law follows as founded on public convenience, has applied a certain rule to all cases." [70] This rule is "that the assured shall pay one-third part of the expense of labor and materials requisite to make the repairs, and shall recover only two-thirds of the underwriters, it being considered that in general the ship

[67] *United States:* Western Assur. Co. *v.* Southwestern Transp. Co., 68 Fed. 923, 16 C. C. A. 65; Chicago Ins. Co. *v.* Graham, etc., Co., 108 Fed. 271.

Illinois: Egan *v.* British M. I. Co., 193 Ill. 295, 61 N. E. 1081, 86 Am. St. Rep. 342.

Maine: Thomas *v.* Rockland Ins. Co., 45 Me. 116.

Maryland: Phillips *v.* St. Louis Perpetual Ins. Co., 15 Md. 297.

Massachusetts: Brewer *v.* American Ins. Co., 123 Mass. 78, 25 Am. Rep. 24.

England: Etches *v.* Aldan, 1 M. & R. 165.

But see Mason *v.* Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

[68] Am. Ins. Co. *v.* Griswold, 14 Wend. 399, 458.

[69] Phillips on Insurance, 2d ed., vol. ii, p. 197.

[70] Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 73.

is better by the amount of one-third of the expense of the repairs. This allowance is called the deduction of *one-third new for old.*" [71]

The Supreme Court of Massachusetts, speaking of this rule, have said that it "is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss without first repairing the damage done or estimating the cost of repairs." [72] ** The rule applies though the advantage of the new materials over the old is much more than a third of the expenditure,[73] but in England it does not apply to a first voyage.[74] This distinction is not taken in the United States.[75] The rule applies only to those expenses from which the assured derives an enhanced value beyond the loss, and not to such items as towage.[76] The deduction is made from the balance of the cost of repairs after first deducting therefrom the value of old materials saved and not from the gross cost.[77]

§ 716. Exceptions to rule of indemnity.

The American policies on vessels frequently contain a declaration, that "no partial loss, or particular average, shall in any case be paid unless amounting to five per cent" or some similar clause, often limiting liability to cases of total loss; and the cargo policies have an analogous provision, defining the extent of the underwriters' liability. By these clauses it will be seen that in a large class of cases no partial loss whatever is to be paid, and in others, none unless amounting to a certain por-

[71] Phillips on Insurance, 2d ed., vol. ii, p. 197; Poingdestre *v.* Royal Exchange, Ry. & M. 378.

[72] Brinley *v.* National Ins. Co., 11 Met. (Mass.) 195.

[73] Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. (N. S.) 323, 28 Wkly. Rep. 1.

[74] Fenwick *v.* Robinson, 3 C. & P. 323; Pirie *v.* Steele, 8 C. & P. 200, 2 M. & Rob. 49, 34 E. C. L. 689.

[75] *Massachusetts:* Nickels *v.* Maine F. & L. Ins. Co., 11 Mass. 253.

New York: Dunham *v.* Commercial Ins. Co., 11 Johns. 315, 6 Am. Dec. 374.

[76] Potter *v.* Ocean Ins. Co., 9 Fed. Cas. No. 11,335, 3 Sumn. 27. See also, De Costa *v.* Newnham, 2 T. R. 407.

[77] *Massachusetts:* Eager *v.* Atlas Ins. Co., 14 Pick. 141, 25 Am. Dec. 363.

New York: Byrnes *v.* National Ins. Co., 1 Cow. 265.

tion of the whole value insured. In the former case, to found a claim for recovery, the subject at risk must be totally lost. And as to what constitutes a total loss, many very interesting cases have been decided. But this inquiry is foreign to our present subject. Unless the injury comes up to the limit fixed by the policy, the insured can claim no damages; he can have no remuneration or compensation for any loss less than that required by the contract.[78] The valuation in the policy is to be taken as the basis of determining the percentage of loss [79] and there must be a deduction of one-third new for old.[80] A particular average cannot be combined with a general average to make up the required percentage.[81] The expense of salvage may be added to the actual depreciation of the property.[82] In the United States distinct losses during the same voyage cannot be added together.[83] The rule is otherwise in England, but losses occurring in more than one voyage cannot be taken together under a time policy.[84]

In an English case, a time policy contained a warranty "free from average under three per cent." During the voyage the vessel sustained damage which was not discovered until the end of the voyage. The voyage having been completed, and the vessel put into dock for repairs other than those covered by the policy, the injury was for the first time discovered. The ship was in port eight days. Had it not been for the injury covered by the policy she would have been there but three days. The repairs of that injury alone would have taken the whole eight days. If the dock charges for the last five days only where added to the cost of repairs, there was not a loss

[78] The Irish Court of Admiralty has applied this rule to the claims of seamen for clothing lost by a marine collision. The Cumberland, 5 L. T. R. 496.

[79] Riley *v.* Ocean Ins. Co., 11 Rob. (N. Y.) 255.

[80] *District of Columbia:* Sanderson *v.* Columbian Ins. Co., 21 Fed. Cas. No. 12,298, 2 Cranch C. C. 218.

Missouri: Kerr *v.* Quaker City Ins. Co., 33 Mo. 158.

[81] Price *v.* Ships Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. (N. S.) 278, 27 Wkly. Rep. 566.

[82] Hall *v.* Rising Sun Ins. Co., 1 Disn. (Ohio) 308, 12 Ohio Dec. 639.

[83] Hagar *v.* England M. M. I. Co., 59 Me. 460, 8 Am. Rep. 428. But see Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366.

[84] Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J. 244, 1 L. J. Exch. 101, 2 Tyrw. 266; Stewart *v.* Merchants' M. I. Co., 16 Q. B. D. 619, 5 Aspin. 506, 55 L. J. Q. B. 81, 53 L. T. Rep. (N. S.) 892, 34 Wkly. Rep. 208.

of three per cent. But it was held that the dock charges for the first three days ought to be attributed partly to the injury insured against, and partly to the ordinary repairs; and one-half the charges should be attributed to the injury.[85]

§ 717. General average.

* General average or contribution in general average, is that sum which on any voluntary sacrifice of a part of the interests at risk for the joint benefit of all, becomes due from the other parties to the adventure to make up for the sacrifice.** Casual and inevitable loss is not a subject of general average,[86] nor can there be recovery on a marine policy as for general average when part of a cargo is thrown over to take on board the crew of another sinking vessel.[87] In the United States wages and provisions of the crew during detention in an intermediate port for repairs necessitated by a sacrifice for the common benefit are recoverable as general average.[88] The English rule is otherwise.[89] Unless a custom in a particular trade is otherwise, there can be no recovery for the jettison of goods carried on deck.[90]

* The interests generally in jeopardy in these cases are the vessel, freight, and cargo; and when the sacrifice is to be made good in general average, the values of these subjects are to be arrived at as forming the basis of contribution. Although there has until recently been some want of precision in the rule on the subject of contribution by the cargo, owing chiefly to the false assumption that "prime cost," "invoice price," and "market value" were synonymous and convertible terms,[91] it is now

[85] Marine Ins. Co. *v.* China Transpacific Steamship Co., 11 App. Cas. 573, 6 Aspin. 68, 57 L. J. Q. B. 100, 55 L. T. Rep. (N. S.) 491, 35 Wkly. Rep. 169.

[86] Shiff *v.* Louisiana S. I. Co., 6 Mart. (La.), N. S. 629.

[87] Dabney *v.* New England M. M. I. Co., 14 Allen, 300.

[88] *United States:* Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613.

Louisiana: Hanse *v.* New Orleans M. & F. I. Co., 10 La. 1, 29 Am. Dec. 456.

Massachusetts: Padelford *v.* Boardman, 4 Mass. 548.

But see *South Carolina:* Wightman *v.* Macadam, 2 Brev. 230.

[89] Power *v.* Whitmore, 4 M. & S. 141.

But see De Costa *v.* Newnham, 2 T. R. 407.

[90] *United States:* Wood *v.* Phœnix Ins. Co., 1 Fed. 235.

England: Miller *v.* Letherington, 6 H. & N. 278, 7 C. B. (N. S.) 954.

In Gould *v.* Oliver, 4 Bing. N. C. 134, custom of the trade entitled the owner of goods shipped on deck to contribution for their jettison.

[91] Gahn *v.* Broome, 1 Johns. Cas. 120; Marshall on Ins., 5th ed., pp. 502, 503.

practically settled in the United States, that in estimating a loss under an open policy, the rule of damages or insurable interest is the *market value* of the vessel or goods at the beginning of the risk, ascertained according to the rate of exchange at that time, together with the premium of insurance, and in the case of goods, the expenses necessarily incurred upon them at the time of shipment.[92] ** Where a cargo jettisoned had no market value at the port of departure the valuation in the bill of lading was taken, and the court said that in the absence of such valuation the cost price including shipping charges would be the valuation.[93] In England the insurable interest under open policies is now said to be its worth *to the assured* at the outset of the risk, with the expenses of insurance.[94] * The vessel and freight are of more fluctuating and uncertain value. The actual worth of the vessel diminishes during the voyage with each day's wear and tear; and the value of the freight is also diminishing by reason of the wages, provisions, and expenses, which are in a constant state of disbursement to earn it. In New York, to arrive at the value of the vessel, one-fifth of its value at the time of sailing is deducted; and the freight contributes on one-half, and is contributed for on the whole.[95] And this principle of arbitrary valuation, though the rate or proportion may differ, prevails, we believe, universally throughout the United States.[96] ** Where there is a total loss of part of the freight, as in the case of a ship being too damaged on the voyage to return, the loss must be estimated on the value of the ship and freight, and not that of the freight only.[97]

Goods contribute on their actual net value; that is, on their

Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436.

[92] 2 Phil. on Ins., §§ 1221, 1222, 1229, 1231; Carson *v.* The Marine Ins. Co., 2 Wash. C. C. 468; Warren *v.* Franklin Ins. Co., 104 Mass. 518, 6 Am. Rep. 261; Cox *v.* Charleston Fire & Mar. Ins. Co., 3 Rich. 331, 45 Am. Dec. 771.

[93] Tudor *v.* Macomber, 14 Pick. (Mass.) 34.

[94] 1 Arnould on Mar. Ins. (6th ed.), p. 318.

[95] This was the rule laid down in the case of Leavenworth *v.* Delafield, 1 Cai. 573, and has been acted on ever since. The principle has been somewhat shaken by Judge Betts in the District Court of the United States. The Mutual Safety Ins. Co. *v.* The George, Olcott, 157, to which here, however, it is only necessary to call attention thus briefly.

[96] So it is held that the contributory value of freight in general average is to be ascertained by a deduction of one-third of the gross freight. Humphreys *v.* Union Ins. Co., 3 Mason, 429.

[97] Moss *v.* Smith, 9 C. B. 94.

market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing. But in a case where the goods brought at the intermediate port more than they would have done at the port of destination, the court, per Abbott, C. J., refused to set aside the valuation which had been adopted, which was the price actually obtained.[98] Where the insured has been forced to make contribution in respect of an average loss, the insurers are held for that proportion of the contribution which the value of his interest as assured bears to its value as estimated for the purposes of contribution. There may be recovery by the owner of jettisoned goods to their full value without first collecting the contribution to which he is entitled from the owners of the ship and cargo.[99] But where ship, freight, and cargo belong to the same person, the owner cannot recover of the insurers on the vessel the whole general average but can recover only the portion chargeable to the vessel.[100] An insurer is liable to pay the amount of general average as adjusted in a foreign port though greater than if it had been adjusted in the domestic port.[101]

* It may be proper to add, that the American rule of arbitrary remuneration has been greatly extended by the general adoption in this country of the practice of valuation. It has become habitual to value the thing assured in the policy; and these valuations fix the basis of recovery, and forbid inquiry into the actual damage sustained, unless the overestimate is so great as to induce a belief of fraud.[102] **

[98] Richardson *v.* Nourse, 3 B. & Ald. 237.

[99] Dickenson *v.* Jardine, L. R. 3 C. P. 639, 37 L. J. C. P. 321, 18 L. T. Rep. (N. S.) 17, 16 Wkly. Rep. 1169.

See, also, *United States:* International Nav. Co. *v.* Atlantic M. I. Co., 100 Fed. 304 (ship).

Massachusetts: Lord *v.* Neptune Ins. Co., 10 Gray, 109 (freight).

[100] Jumel *v.* Mar. Ins. Co., 7 Johns. 412, 5 Am. Dec. 283.

[101] *United States:* Croshaw *v.* Ins. Co. of N. Am., 66 Fed. 604.

Massachusetts: Loring *v.* Neptune Ins. Co., 20 Pick. 411.

New York: Strong *v.* N. Y. Firemen's Ins. Co., 11 Johns. 323.

England: Dent *v.* Smith, L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. Rep. (N. S.) 868, 17 Wkly. Rep. 646.

Canada: Avon M. I. Co. *v.* Bateaux, 2 Nova Scotia Dec. 195.

But see *Maine:* Thornton *v.* U. S. Ins. Co., 12 Me. 150.

New York: Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.

[102] Irving *v.* Manning, 6 C. B. 391; Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 5 Am. Rep. 162. See as to adjustment of general average in various

§ 718. Proximate cause and consequential loss.

The law of Marine Insurance, which in the plan of this book is touched on but lightly, is full of nice questions both as to consequential damages and proximate cause, the latter generally involving the right of action, the former the limits of recovery. Where a vessel is injured by a peril of the sea, and further injury occurs from the master's neglect to have her repaired; where, in the case of an insurance on cargo, the ship is lost and the goods are saved, but are afterwards partially lost in consequence of the master's neglect to tranship them; and generally, where the master's neglect is the immediate cause by which the injury, although arising from a peril insured against, produces the damage, the insurers are not liable.[103] So where the vessel was wrecked in time of war, and the cargo would have been saved but for the interference of hostile troops, the loss was held to be due to war, and not to a peril insured against.[104] But if the loss was a remote consequence only of the negligence of the master or crew, but a direct one of a peril insured against, the underwriters are not discharged.[105] So a collision is a peril within a policy insuring against the perils of the sea, and the insured may recover the damage which was the immediate consequence of it, although the vessel was brought within the peril by the fault of the master or crew.[106] But the underwriters in such a case are not liable to pay the owners of the insured vessel the damages which the latter have been compelled to pay the owners of the other vessel to avoid

cases, Mecker *v.* Klemm, 11 La. Ann. 104; Greely *v.* The Tremont Insurance Company, 9 Cush. (Mass.) 415; Nelson *v.* Belmont, 5 Duer (N. Y.), 310; Lee *v.* Grinnell, Ibid. 400; Nimick *v.* Holmes, 25 Pa. 366, 64 Am. Dec. 710.

[103] *United States:* Hazard *v.* New England M. I. Co., 1 Sumn. 218.

Massachusetts: Cleveland *v.* Union Ins. Co., 8 Mass. 308; Copeland *v.* New England M. I. Co., 2 Met. 432.

New York: Schieffelin *v.* New York Ins. Co., 9 Johns. 21.

[104] Ionides *v.* Universal M. I. Co., 14 C. B. (N. S.) 259, 32 L. J. C. P. 170, 8 L. T. Rep. (N. S.) 705.

[105] American Ins. Co. *v.* Bryan, 26 Wend. 563, 583.

[106] *United States:* General M. I. Co. *v.* Sherwood, 14 How. 351, 14 L. ed. 352.

New York: Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

South Carolina: Street *v.* Augusta Ins. Co., 12 Rich. 13.

These cases establish the present rule on the point, and those of Peters *v.* Warren Ins. Co., 14 Peters, 99, 10 L. ed. 99; Hale *v.* The Washington Ins. Co., 2 Story, 176; Nelson *v.* The Suffolk Ins. Co., 8 Cush. 477, which are in conflict with it, can no longer be regarded as of general authority.

being sold.[107] And where a policy on a boat excepts from the perils insured against, perils and misfortunes arising from a want of ordinary care and skill in lading or navigating her, the fact that the master placed her in a dangerous position for being towed, is material in determining the insurer's liability.[108] A boat insured struck a rock and sank. The insurers were sued. The wages and provisions of the crew, during the detention, were not allowed to be estimated as a part of the damages.[109] In Massachusetts, the plaintiff is allowed to recover on his insurance policy the damages paid to another vessel for injury by the collision. The plaintiff's vessel having been held liable in a foreign court of admiralty for the injury, the plaintiff and the owner settled the damages between themselves. Although the insurers had no notice of the suit, they were held liable for this amount, but not for interest for time previous to filing the writ.[110] The obligation of the insurer, in cases of partial loss, is simply to pay such loss. It does not extend to consequential losses, nor to loans obtained in a foreign port for repairs, though the expense of raising the money on bottomry is part of the partial loss which he must pay.[111]

§ 719. Reduction of damage.

* We have already had occasion to notice, that though the plaintiff's loss had been made good by charitable contributions, his claim for legal relief is not thereby prejudiced; and there are other cases where he has been allowed remuneration beyond his positive loss. So, it is no defence to an action for a partial loss on a policy of marine insurance, that the expense of the repairs for the amount of which the loss is claimed was covered by a loan made by the correspondent of the owner on a bottomry of the vessel, and that the bottomry loan was realized by such correspondent, after the subsequent total loss of the vessel, out of an insurance effected by him on his bottomry interest, and that no part of the loan was ever paid by the

[107] Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

[108] Savage *v.* Corn Exchange Ins. Co., 4 Bosw. 1.

[109] May *v.* Delaware Ins. Co., 19 Pa. 312.

[110] *Massachusetts:* Thwing *v.* Great Western Ins. Co., 111 Mass. 93.

Contra, New York: Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

[111] Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123.

owner.[112] ** But where a loss occurs under a valued policy, the plaintiff can only recover the difference between the amount he has received from other insurances and the agreed value.[113] And where upon an actual total loss the sale of the hulk produced a certain sum, that sum is to be deducted from the valuation.[114] So too, where the owner of a ship furnishes the cargo and on damage to the ship abandons the same to the underwriter, the latter may deduct from the valuation of the vessel the freight from the point where the ship was abandoned to the port of destination.[115]

II.—Fire Insurance

§ 720. Fire insurance a contract of indemnity.

* When we turn to the subject of fire insurance, we find that the policy retains much more nearly its original character as a contract of indemnity. In this branch of the great business of insurance, the practice of valuation is less common than in other branches of insurance; the doctrine of abandonment has never been introduced; and the right to recover depends, in all cases, on the actual loss sustained,[116] to be proved in the particular instance.[117] **

Any evidence conducing to show the loss less than that claimed, is admissible. The doctrine relative to reduction of damages has no application to such a case.[118] A fire insurance company which insured goods, and the government tax on the same, has been held liable for the amount of that tax, although not paid, where the government had entered judgment and the insured had given bonds for payment. These bonds were given in Kentucky, where they operate under the statutes as satisfaction of the judgment. It was held not to be an

[112] Read *v.* Mutual Safety Ins. Co., 3 Sandf. (N. Y.) 54.

[113] Bruce *v.* Jones, 1 H. & C. 769.

[114] Smith *v.* Manufacturers' Ins. Co., 7 Met. (Mass.) 448.

[115] Miller *v.* Woodfall, 8 E. & B. 493, 4 Jur. (N. S.) 302, 27 L. J. C. B. 120, 92 E. C. L. 493.

[116] An interesting discussion of some important points on the measure of damages in cases of insurance against fire, will be found in the opinion of Jones, C. J., in Laurent *v.* Chatham F. I. Co., 1 Hall (N. Y.), 41.

[117] *Illinois:* Illinois M. F. I. Co. *v.* Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620.

Pennsylvania: Ellmaker *v.* Franklin F. I. Co., 5 Pa. 183.

[118] Franklin F. I. Co. *v.* Hamill, 6 Gill (Md.), 87.

answer to say that the government could not have collected the tax if the insurers had refused to defend the suit.[119]

On a fire insurance policy the whole amount of the loss is recovered, up to the amount of the risk, though the loss is only partial.[120] Nor is it material that the value of the goods insured exceeds the total amount of insurance, for the doctrine of coinsurance by the owner as applied to marine policies is not applicable to fire policies.[121] Where several buildings, or goods in several buildings, are insured in one policy, the whole loss incurred by the destruction of one building may be recovered up to the amount of the risk.[122]

§ 721. Measure of loss.

* In Ireland, the general rule in cases of fire insurance has been thus laid down in a case where a mill and machinery were injured by fire. The court directed the jury to say, "what state of repairs the machinery was in, what it would cost to replace it by new machinery, and how much better, if at all, the mill in which the machinery was placed would be with the new machinery than it was at the time of the fire; the difference to be deducted from the entire expense of placing there such new machinery." [123] This rule has been adopted in this country in cases where the property is injured and repaired so as to replace it substantially as it was before the accident.[124] But in cases of total destruction much confusion once existed.

Mr. Greenleaf has said,[125] that the actual loss is to be as-

[119] Insurance Co. *v.* Thompson, 95 U. S. 547, 24 L. ed. 487.

[120] *Massachusetts:* Liscom *v.* Boston M. F. I. Co., 9 Met. 205; Underhill *v.* Agawam M. F. I. Co., 6 Cush. 440.

Mississippi: Mississippi M. I. Co. *v.* Ingram, 34 Miss. 215.

Pennsylvania: Phœnix F. I. Co. *v.* Cochran, 51 Pa. 143, 88 Am. Dec. 569.

[121] *Louisiana:* Nicolet *v.* Insurance Co., 3 La. 366, 23 Am. Dec. 458.

Canada: Peddie *v.* Quebec F. Assur. Co., Stuart, 174.

But the policy may provide that the owner shall be deemed a coinsurer if insurance is not carried to a specified amount. Cheseborough *v.* Home Ins. Co., 61 Mich. 333, 28 N. W. 110.

[122] *Louisiana:* Nicolet *v.* Insurance Co., 3 La. 366, 23 Am. Dec. 458; Wallace *v.* Insurance Co., 4 La. 289.

Massachusetts: Commonwealth *v.* Hide & L. I. Co., 112 Mass. 136, 17 Am. Rep. 72.

New Hampshire: Rix *v.* Mutual Ins. Co., 20 N. H. 198.

[123] Vance *v.* Forster, 1 Irish Circ. Cas. 47, 3 Stephens' N. P. 2084.

[124] Brinley *v.* National Ins. Co., 11 Met. (Mass.) 195.

[125] 2 Greenleaf on Ev., § 407.

certained by the expense of restoring the property, without any deduction for the difference of value between the old and new materials; and, on the other hand, an effort was made in Massachusetts, in a suit on a fire policy, to introduce the analogies of marine insurance; the defendants insisting on deducting from the estimated cost of a new building, the difference in value between the old and such new building. The property had been totally destroyed, and a different building had been erected on the premises. In this case both these rules were rejected; the court saying as to the latter, with great justice, that it was not supported by any authority or principle. They also refused to sanction the principle laid down by Mr. Greenleaf, saying that, if it were followed, the assured, in some cases would recover more than an indemnity, and much more when the building is dilapidated and out of repairs; that the underwriters are liable only to pay a fair indemnity for the loss; and that, whatever the rule might be when the building insured is partially injured by the peril assured against, it has no application to cases like the present, where the building is totally destroyed and to be replaced by a new one; and they proceeded to say: "If the rule laid down in Vance *v.* Forster were applied, the jury must ascertain by the estimates and opinions of witnesses the amount of the expenses of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for when the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are, therefore, of opinion that there is no rule of damages applicable to the present case; and that, in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception." And a new trial was ordered.[126] **

§ 722. Actual value of the property lost.

But this case is not any longer to be considered as expressing the law, even in Massachusetts. The measure of damages is

[126] Brinley *v.* National Ins. Co., 11 Met. (Mass.) 195.

now recognized as a question for the court. The general rule is the value of the property at the time of the fire.[127] The amount of the risk is not even *prima facie* evidence of the extent of loss.[128] Where a house is destroyed, the measure of damages is not its cost originally or to rebuild,[129] nor its value if removed, nor the difference in value of the land with and without it, but is the value of the house itself, as it stood on the land just before its destruction. This is to be arrived at by comparing its value with that of a new house of the same size and kind.[130] Evidence of the original cost of the building [131] or of the cost of erecting a similar building at the time [132] of the fire is admissible only as showing its present value, and the income from rentals at the time of the building's destruction may be shown for the same purpose.[133] Where an insured building was destroyed by fire at the order of a board of health on the ground that it was infected, it was held that the loss was recoverable under a fire policy and that the buildings were not valueless because condemned.[134] Where the assured has contracted for the erection of a building upon his land and has secured the same before its completion, recovery is not affected by the fact that the contractor may be compelled to replace the building without expense to the assured.[135] Nor is the measure of damages affected by the fact that, in accordance with a contract between the plaintiff and a third party, the building was soon to be removed, and its value for removal was less.[136] Upon partial loss of a building the measure of damages

[127] Fowler *v.* Old North State Ins. Co., 74 N. C. 89.

[128] Lion F. I. Co. *v.* Starr, 71 Tex. 733.

[129] *Iowa:* Guinn *v.* Phœnix Ins. Co., 80 Ia. 346, 45 N. W. 880.

Pennsylvania: Waynesboro Mut. F. Ins. Co. *v.* Creaton, 98 Pa. 451.

[130] *Colorado:* State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

Kentucky: Ætna Ins. Co. *v.* Johnson, 11 Bush, 587, 21 Am. Rep. 223.

[131] Scott *v.* Security F. I. Co., 98 Ia. 67, 66 N. W. 1054.

[132] Holter Lumber Co. *v.* Fireman's F. I. Co., 18 Mont. 282, 45 Pac. 207.

[133] *Colorado:* Atlanta Ins. Co. *v.* Manning, 3 Colo. 224.

Pennsylvania: Cumberland Valley M. P. Co. *v.* Schell, 29 Pa. 31.

[134] Lee Ahlo *v.* Ins. Co., 16 Hawaii, 737.

[135] *New York:* Foley *v.* Manufacturers' & B. I. Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.

Wisconsin: St. Clara Female Academy *v.* Northwestern N. I. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805.

[136] Washington M. E. M. Co. *v.* Weymouth & B. M. F. I. Co., 135 Mass. 503.

is the difference between the value of the property whole and damaged.[137] That after the fire the assured sold the premises for the same price at which he had contracted to sell them before the fire does not prevent recovery of the actual amount of damage to the property insured.[138]

The amount of recovery for a total loss of personalty is the value of the property at the time and place of the loss. If the assured is a manufacturer the damages are not limited to the cost of production but are the amount for which he could sell the goods in the market.[139] So where a policy on lumber provides that the liability of the insurer shall not exceed "what it would then cost the insured to replace" the property, an owner of milled lumber can recover the market value of the same and is not restricted to the cost of cutting an equal amount of his own standing timber;[140] an underwriter may always show that the property is worth less than the cost of manufacture.[141] A retail dealer may recover the amount necessary to replace the goods in the wholesale market,[142] and that he obtained them at a considerable discount is immaterial.[143] Nothing can be added to the wholesale value on account of estimated profits.[144] Where a stock of goods was replaced

[137] *Louisiana:* Hoffman *v.* Western M. & F. I. Co., 1 La. Ann. 216.

Tennessee: Burkett *v.* Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. 848.

Texas: German Ins. Co. *v.* Everett, 18 Tex. Civ. App. 514, 46 S. W. 95.

[138] Tiemann *v.* Citizens' Ins. Co., 76 App. Div. 5, 78 N. Y. Supp. 620.

[139] *Illinois:* Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.

New York: Hoffman *v.* Ætna Ins. Co., 1 Rob. 489, 501.

North Carolina: Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 289.

Texas: Hartford F. I. Co. *v.* Cannon, 19 Tex. Civ. App. 305, 46 S. W. 851.

Canada: Equitable F. Ins. Co. *v.* Quinn, 11 L. C. Rep. 170.

Contra, Pennsylvania: Standard S. M. Co. *v.* Royal Ins. Co., 201 Pa. 645, 51 Atl. 354.

[140] Mitchell *v.* St. Paul G. F. I. Co., 92 Mich. 594, 52 N. W. 1017.

But the rule is otherwise where the policy stipulates that the measure of damages "shall in no case exceed the actual cost of producing the lumber destroyed." Chippewa Lumber Co. *v.* Phœnix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

[141] Commonwealth Ins. Co. *v.* Sennett, 37 Pa. 205, 77 Am. Dec. 418 (defective machinery).

[142] Hoffman *v.* Ætna Ins. Co., 1 Rob. (N. Y.) 489.

[143] Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

[144] Niagara F. I. Co. *v.* Heflin, 60 S. W. 393, 22 Ky. L. Rep. 1212.

within thirty days after the loss, the cost of replacing them was held to fix the amount of recovery.[145] The price at which the owner of personalty offered to sell it shortly before the fire is evidence of its value,[146] but a contract by the assured for the future delivery of like property is irrelevant.[147] If there is no market at the place of the loss, the value of the property at the nearest market with proper addition or deduction for freight is to be taken.[148] The owner of household furniture or clothing recovers its usable value to himself and not merely its value to a secondhand dealer, though no sentimental value can be taken into account.[149] What the property brought at auction after the loss is evidence of its then value.[150] Where, by the terms of a policy of insurance upon goods contained in the public stores, the underwriters agreed to make good to the assured, all such loss as should happen to the goods by fire, "to be estimated according to the true and actual cash value of the property at the time the loss should happen," the measure of damages was such value, notwithstanding the duties upon the goods had not been paid or secured.[151] So where a distiller is liable for the tax on whiskey destroyed in bond, the measure of damages is the value including the tax.[152]

The measure of damages is not, however, always or necessarily equal to the market value of the property. "The contract of the insurer is not that, if the property is burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been in if no fire had oc-

[145] Plow Co. *v.* Ins. Co. (Tex. Civ. App.), 87 S. W. 192.

[146] Joy *v.* Security Ins. Co., 83 Ia. 12, 48 N. W. 1049.

But *cf.* De Groat *v.* Fulton, etc., Ins. Co., 4 Rob. 504.

[147] Western Assur. Co. *v.* Studebaker Bros. Manuf. Co., 124 Ind. 176, 23 N. E. 1138.

[148] Grubbs *v.* N. S. Home Ins. Co., 108 N. C. 472, 13 S. E. 236.

[149] Sun Fire Office *v.* Ayerst, 37 Neb. 184, 55 N. W. 635.

[150] *Massachusetts:* Clement *v.* British Assur. Co., 141 Mass. 298, 5 N. E. 847.

New York: Henderson *v.* Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

But see *United States:* Reading Ins. Co. *v.* Egelhoff, 115 Fed. 393.

Iowa: Lewis *v.* Burlington Ins. Co., 80 Ia. 259, 45 N. W. 749.

[151] *Kentucky:* Queen Ins. Co. *v.* McCoin, 105 Ky. 806, 49 S. W. 800.

New York: Wolfe *v.* Howard Ins. Co., 7 N. Y. 583.

[152] Hedger *v.* Union Ins. Co., 17 Fed. 498.

curred." [153] If the policy provides for an appraisement of the loss by arbitrators or the parties agree to arbitration, the award is binding upon both parties in the absence of fraud.[154]

A statement in the proofs of loss does not prevent recovery of a greater sum than there claimed.[155] After a partial loss has been paid recovery for a total loss occurring thereafter is limited to the amount of the policy less the amount paid on the prior loss.[156]

§ 722a. Valued policies.

Though the practice of valuation is not common in fire policies, whenever the subject-matter of the insurance is valued the analogies of marine policies would seem applicable. The agreed valuation is binding in the absence of fraud [157] and partial losses should be adjusted on that basis. The words "valued at" or "worth" or some equivalent expression are necessary to constitute a valuation: the mere insurance of specified sums on specified property is not such.[158]

In several jurisdictions statutes have been enacted whereby the sum insured is taken as conclusive of the value of the property at the time of the loss and the measure of recovery for a total loss thereof.[159] Such statutes are usually confined to in-

[153] Morton, C. J., in Washington M. E. M. Co. *v.* Weymouth & B. M. F. I. Co., 135 Mass. 503, 506.

[154] *Pennsylvania:* Snowden *v.* Kittanning Ins. Co., 122 Pa. 502, 16 Atl. 22, 9 Am. St. Rep. 124.

Canada: Heron *v.* Hartford Ins. Co., 4 Montreal Super. Ct. 388.

[155] *Iowa:* Crittenden *v.* Springfield F. & M. Ins. Co., 85 Ia. 652, 62 N. W. 548, 39 Am. St. Rep. 321.

Michigan: Sibley *v.* Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473.

[156] Mechanics' Ins. Co. *v.* Hodge, 46 Ill. App. 479.

[157] *Maine:* Cushman *v.* Northwestern Ins. Co., 34 Me. 487.

New York: Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 App. Div. 182, 71 N. Y. Supp. 918.

[158] Wallace *v.* Insurance Co., 4 La. 289.

[159] *Arkansas:* Rev. St., § 4375.

Delaware: Laws of Del., chap. 695, Vol. 18.

Florida: Gen. St. (1906), § 2776.

Kansas: Gen. St. (1905), § 3538.

Kentucky: Ky. St., § 700.

Louisiana: Rev. St., Act 135 (1900), §§ 1–2.

Minnesota: Rev. Laws (1905), § 1642.

Mississippi: Code of 1906, § 2592.

Missouri: Rev. St., § 7969.

Nebraska: Comp. St. (1907), chap. 43, § 43.

New Hampshire: Pub. St., chap. 170, § 5.

Ohio: Rev. St., § 3643.

Oklahoma: Gen. St. (1908), § 3356.

South Carolina: Civil Code, § 1815.

South Dakota: Civil Code (1903), § 1953.

Texas: Civil St., Art. 3089.

West Virginia: Code (1906), § 1108.

surance upon realty [160] and are not applicable save in case of total loss. Clauses in a policy limiting liability to a fraction of the cash value of the property, or to such proportion of the value as the sum insured bears to the total insurance, provisions for arbitration of the amount of loss, or giving the underwriter an election to rebuild are generally held invalid as inconsistent with these statutes. A building is a total loss within the meaning of such acts when it has lost its identity as such, though there are portions of the walls remaining and capable of being used in rebuilding.[161] Where there are several concurrent policies with the consent of the underwriters the aggregate of all the policies is taken as the value of the property and the several amounts named are recoverable.[162]

§ 723. Election of insurer to rebuild—Alternative contract.

It is a frequent provision in fire policies, that in case of loss the insurers, instead of paying it in money, may rebuild or repair the premises, on giving notice to the insured of their election to do so. The policy is in this respect an alternative contract, and the exercise of the election, by giving the notice, converts the contract of insurance into a building contract; and in case the rebuilding is thereupon begun and discontinued by the insurance company, the rule of damages is no longer the amount insured, but that necessary to complete the rebuilding. And where several companies have given the notice, and the contract thus substituted is broken by all, the insured can recover

Wisconsin: Rev. St., § 1943.

See, also, *Iowa:* Code of 1897, § 1742.

[160] A house built on a leased lot with privilege of removal was held to be realty within the meaning of the statute. Orient Ins. Co. *v.* Parlin Orendorff Co., 14 Tex. Civ. App. 512, 38 S. W. 60.

[161] *California:* Williams *v.* Hartford Ins. Co., 54 Cal. 442, 450, 35 Am. Rep. 77.

Kentucky: Palatine Ins. Co. *v.* Weiss, 59 S. W. 509, 22 Ky. L. Rep. 994.

Missouri: Stevens *v.* Ins. Co., 120 Mo. App. 88, 96 S. W. 684.

Texas: Murphy *v.* American C. I. Co., 25 Tex. Civ. App. 241, 54 S. W. 407.

Wisconsin: Linder *v.* St. Paul F. & M. I. Co., 93 Wis. 526, 67 N. W. 1125.

Contra, Minnesota: Northwestern M. L. I. Co. *v.* Rochester G. I. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108, 89 Am. St. Rep. 534.

[162] *Iowa:* Wensel *v.* Ins. Assoc., 129 Ia. 295, 105 N. W. 522.

Missouri: Barnard *v.* National F. I. Co., 38 Mo. App. 107, 117.

Wisconsin: Oshkosh Gas Light Co. *v.* Germania F. I. Co., 71 Wis. 454, 5 Am. St. Rep. 233.

against any one of them the whole cost of completing the restoration of the building, leaving the company against whom the judgment is recovered to obtain contribution from the others.[163] Where the company elects to rebuild, and after waiting some time refuses to do so, the insured may recover under the policy what it would have cost the company to rebuild at the date of refusal, together with damages for injury to the property through the exposure.[164] But it has been held that if he so desires the assured may in such a case treat the election of the underwriter as no longer binding and may sue on the original contract for money indemnity.[165] Rent of the land during the period of the delay was also allowed in an Illinois case.[166] This rule seems questionable in that it loses sight of the fact that the contract, by the election of the company, has become a contract to rebuild. If the repairs are made in good faith, but do not make the building equal in value to the original structure, the difference in value between the building before loss and as repaired is the measure of damages.[167] Upon a partial loss the insurer elected to reinstate; but the public authorities condemned the building for causes apart from those insured against and removed it. The insurer, notwithstanding the action of the authorities, was held bound to reinstate, which in this case practically compelled them to pay for a total loss.[168] Where building inspectors refused to allow the erection of a frame building the underwriter was held bound to rebuild with brick.[169] If during the running of the policy and before complete reinstatement of a partial loss, a second fire destroys the

[163] Morrell *v.* Irving F. I. Co., 33 N. Y. 429, 88 Am. Dec. 396.

[164] American C. I. Co. *v.* McLanathan, 11 Kan. 533.

[165] Langan *v.* Ætna Ins. Co., 99 Fed. 374.

[166] Home M. F. I. Co. *v.* Garfield, 60 Ill. 124, 14 Am. Rep. 27.

[167] *United States:* Hartford F. I. Co. *v.* Peebles Hotel Co., 82 Fed. 546.

Massachusetts: Parker *v.* Eagle F. I. Co., 9 Gray, 152.

Where the building collapsed owing to defective rebuilding and the tenant of the insured was obliged to discontinue occupancy, the assured was allowed to recover the value of the lost term. Henderson *v.* Sun M. I. Co., 48 La. Ann. 1031, 20 So. 164, 55 Am. St. Rep. 292.

[168] Brown *v.* Royal Ins. Co., 1 E. & E. 853. It would seem that the company would be called upon to pay the whole value of the building, even if it were greater than the risk; for having elected to reinstate, the owner became entitled to a building equal in value to the one destroyed.

[169] Fire Assoc. *v.* Rosenthal, 108 Pa. 474, 1 Atl. 303.

entire property, the insurer is not entitled to credit for the amount already expended but must make good the whole of the second loss up to the amount insured.[170] Where there is no clause in the policy giving the insurer the right to rebuild, no such right exists.[171]

§ 723a. Proximate cause.

A policy against fire covers only such damage as is caused by a hostile or unintended fire.[172] Where such a fire causes the loss there may be recovery for all ensuing damage irrespective of intervening acts of human agents. Thus where a wooden building is injured by fire and a city ordinance prevents its repair it is deemed a total loss,[173] or if the cost of repairs is increased by reason of such an ordinance the increased cost is recoverable.[174] So too where a building is blown up to prevent the spread of a conflagration there may be recovery whether the act was legal or illegal.[175] The insurer is liable for all losses arising out of *bona fide* efforts to extinguish the fire or save the insured property therefrom, such as damage by water,[176] expense of packing goods preparatory to removal from a threatened building,[177] or damage sustained during such

[170] Smith *v.* Colonial Mut. F. Ins. Co., 6 Vict. L. R. 200.

[171] Wallace *v.* Insurance Co., 4 La. 289.

[172] *Massachusetts:* Way *v.* Abington Mut. F. Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. Rep. 379.

England: Austin *v.* Drewe, 6 Taunt. 436.

[173] *Louisiana:* Montelcone *v.* Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472.

Michigan: Brady *v.* North Western Ins. Co., 11 Mich. 425.

Minnesota: Larkin *v.* Glen Falls Ins. Co., 80 Minn. 527, 83 N. W. 409.

Missouri: O'Keefe *v.* Liverpool, etc., Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819, 62 Am. St. Rep. 742.

[174] *Massachusetts:* Hewins *v.* London Assur. Co., 184 Mass. 177, 68 N. E. 62.

Pennsylvania: Pennsylvania L. Co. *v.* Phila. Contributionship, 201 Pa. 497, 51 Atl. 351.

[175] *New York:* City F. Ins. Co. *v.* Corlies, 21 Wend. 367, 34 Am. Dec. 258.

Pennsylvania: Greenwald *v.* Ins. Co., 3 Phila. 323, 7 Am. L. Reg. 282.

[176] *Louisiana:* Geisek *v.* Crescent M. I. Co., 19 La. Ann. 297.

Massachusetts: Lewis *v.* Springfield F. & M. I. Co., 10 Gray, 159.

Michigan: John Davis & Co. *v.* Insurance Co. of N. America, 115 Mich. 382, 73 N. W. 393.

Missouri: Cohn *v.* National F. I. Co., 96 Mo. App. 315, 70 S. W. 259.

North Carolina: Whitehurst *v.* Fayetteville M. I. Co., 51 N. C. (6 Jones) 352.

[177] Ins. Co. *v.* Leader, 121 Ga. 260, 48 S. E. 972.

removal [178] including loss by theft.[179] Where a fire caused a short circuit of an electric current, the damage to machinery of which the electricity was the immediate cause was held recoverable.[180] Damage from falling walls which had been weakened by fire but did not fall for several days thereafter has been held to be covered by a fire policy.[181]

§ 724. Consequential loss.

The damages for delay in payment are confined to interest on the amount from the time payment is due under the policy. Thus where there is a provision for payment within a stipulated time after proof of loss, interest is recoverable from the date set.[182] If the policy does not fix the date of payment, interest is recoverable from the date of demand and refusal.[183] Where it does not appear that there was a demand and wrongful refusal before action brought, interest should be allowed only from the filing of the writ,[184] but where the insurer waives proofs of loss and repudiates all liability interest is computed from the time of the loss.[185] When the delay in payment is due to fault

[178] *District of Columbia:* Holtzman *v.* Franklin Ins. Co., 12 Fed. Cas. No. 6,649, 4 Cranch C. C. 295.

Georgia: Case *v.* Hartford Fire Ins. Co., 13 Ill. 676.

Maine: White *v.* Republic F. I. Co., 57 Me. 91, 2 Am. Rep. 22.

Oklahoma: Farmers' & M. I. Co. *v.* Cuff, 116 Pac. 435.

[179] *Kentucky:* Leiber *v.* Liverpool Ins. Co., 6 Bush, 639, 99 Am. Dec. 695.

Louisiana: Talamon *v.* Home M. I. Co., 16 La. Ann. 426.

New York: Tilton *v.* Hamilton F. I. Co., 14 How. Pr. 363.

Oklahoma: Farmers' & M. I. Co. *v.* Cuff, 116 Pac. 435.

Pennsylvania: Independent M. I. Co. *v.* Agnew, 34 Pa. 96, 75 Am. Dec. 638.

[180] Lynn G. & E. Co. *v.* Meriden F. I. Co., 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.

[181] Russell *v.* Ins. Co., 100 Minn. 528, 111 N. W. 400.

But see Cuesta *v.* Royal Ins. Co., 98 Ga. 720, 27 S. E. 172.

[182] *Florida:* Hanover F. I. Co. *v.* Lewis, 27 Fla. 219, 10 So. 297.

Illinois: Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388.

Iowa: Wensel *v.* Ins. Assoc., 129 Ia. 295, 105 N. W. 522.

Kentucky: Home Ins. Co. *v.* Patterson, 12 Ky. L. Rep. 941.

Montana: Randall *v.* American F. I. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.

New York: Schmitt *v.* Boston Ins. Co., 82 App. Div. 234, 81 N. Y. Supp. 767.

[183] Baltimore F. I. Co. *v.* Loney, 20 Md. 20.

[184] Thwing *v.* Great Western Ins. Co., 111 Mass. 93.

[185] *Nebraska:* Hartford F. I. Co. *v.* Landfare, 63 Neb. 559, 88 N. W. 779.

Washington: Glover *v.* Rochester G. I. Co., 11 Wash. 143, 39 Pac. 38.

of the assured, these rules do not apply,[186] nor is the insurer liable for interest when the proceeds of the policy have been subjected to trustee process.[187]

The contract of insurance does not permit recovery for loss suffered by interruption of business, loss of possible profits or of rents during the period of rebuilding unless especially stipulated for in the policy.[188] In a peculiar case in New York the defendant insured from loss by fire the plaintiff's royalties, accruing under an exclusive license to use the plaintiff's patent for refining oil. The manufactory of the licensee was destroyed by fire. The measure of recovery was held to be the loss of royalties caused by loss of use of the works during rebuilding, not merely the loss of royalties on the oil destroyed.[189]

§ 725. Recovery by owner of a limited interest.

Any person having any legal interest in property may insure it for the benefit of all concerned and recover the whole loss up to the amount of insurance, holding the balance (if any) above his own interest for the benefit of the equitable or legal owner of it. A bailee—for instance, a consignee or commission agent—may insure and recover the whole value, holding the balance over his own interest for the owner.[190] A fire policy on goods described generally as "the property of the insured or held by him in trust," covers cloth of other parties left with him to be made into clothing, and extends to the whole value of such goods. It is not limited to the bailees' interest or lien for

[186] *Louisiana:* Gettwerth *v.* Teutonia Ins. Co., 29 La. Ann. 30.

Minnesota: Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005.

Oregon: Stemmer *v.* Scottish Ins. Co., 33 Ore. 65, 49 Pac. 588.

[187] *New Hampshire:* Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369.

Vermont: Platt *v.* Continental Ins. Co., 62 Vt. 166, 19 Atl. 637.

[188] *Louisiana:* Pontalba *v.* Phœnix Ass. Co., 2 Rob. 131, 38 Am. Dec. 205.

Massachusetts: Hewins *v.* London Assur. Corp., 184 Mass. 177, 68 N. E. 62.

Pennsylvania: Farmers' Mut. Ins. Co. *v.* New Holland Turnpike Co., 122 Pa. 37.

England: In the Matter of Wright and Pole, 1 A. & E. 621.

[189] Natural F. O. Co. *v.* Citizens' Ins. Co., 106 N. Y. 535, 60 Am. Rep. 473.

[190] *United States:* Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868.

Maryland: Hough *v.* People's F. I. Co., 36 Md. 398.

New York: De Forest *v.* Fulton F. I. Co., 1 Hall, 84.

charges.[191] Warehousemen and wharfingers with whom goods are deposited have an insurable interest in such goods, although no previous authority to insure has been given by the real owners, nor any notice given to them of such insurance, and the insured are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire. They are, of course, liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods.[192]

A mortgagor who insures recovers the whole amount of loss,[193] and so does the mortgagee who insures in connection with the mortgagor.[194] But where the mortgagee insures without the privity of the mortgagor, he is by the better opinion restricted to the amount of the loan unpaid at the time of loss; [195] though in some jurisdictions he is allowed to recover the whole value of the property.[196] He is generally required to surrender his mortgage to the insurer.[197] If, after the destruction of the property, the mortgagee has foreclosed the mortgage, it has been said that he can recover only such an amount, besides what he got on the foreclosure sale, as would indemnify

[191] Stillwell *v.* Staples, 19 N. Y. 401.

Contra, Parks *v.* General Interest Assur. Co., 5 Pick. (Mass.) 34.

[192] Waters *v.* Monarch Ins. Co., 5 E. & B. 870.

[193] *United States:* Carpenter *v.* Providence W. I. Co., 16 Pet. 495, 10 L. ed. 1044 (*semble*).

Massachusetts: Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40, 20 Am. Dec. 507.

[194] Kernochan *v.* New York B. F. I. Co., 17 N. Y. 428.

[195] *United States:* Carpenter *v.* Providence W. I. Co., 16 Pet. 495, 10 L. ed. 1044.

Maryland: Hanover F. I. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

Massachusetts: Haley *v.* Mfg. F. & M. I. Co., 120 Mass. 292.

Missouri: Convis *v.* Citizens' M. F. I. Co., 18 Mo. 262, 59 Am. Dec. 299.

New Jersey: Sussex Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

Washington: Herzog *v.* Ins. Co., 36 Wash. 611, 79 Pac. 287.

[196] *Illinois:* Honore *v.* Lamar F. I. Co., 51 Ill. 409.

Maine: Concord U. M. F. I. Co. *v.* Woodbury, 45 Me. 447; Biddeford Savings Bank *v.* Dwelling House Ins. Co., 81 Me. 566, 18 Atl. 298.

Massachusetts: King *v.* State M. F. I. Co., 7 Cush. 1, 54 Am. Dec. 683.

[197] *United States:* Carpenter *v.* Providence W. I. Co., 16 Pet. 495, 10 L. ed. 495.

Illinois: Honore *v.* Lamar F. I. Co., 51 Ill. 409.

New Jersey: Sussex Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

Contra, Massachusetts: King *v.* State M. F. I. Co., 7 Cush. 1, 54 Am. Dec. 683.

him.[198] So too a deduction was made where the property was sold after the fire and the proceeds applied to the mortgage debt.[199] Where a mortgagee insures property, his recovery is not affected by the fact that the mortgagor has repaired the premises,[200] or that there still remains adequate security for the debt.[201] The assignee of a mortgagee may recover the full damage to the property not exceeding the mortgage debt or the amount of the policy irrespective of the amount paid for the assignment.[202]

Levy of execution does not prevent recovery by the execution debtor for the full damage to the property insured so long as he retains an equity of redemption therein.[203]

Inasmuch as the interest of an unpaid vendor of realty is precisely measurable, recovery on a fire policy covering such an interest should be limited to the amount of the unpaid purchase money,[204] but in many instances the full value of the property not exceeding the amount of the policy has been awarded, the vendor holding the surplus above his own interest for the vendee.[205] The conditional vendor of personalty has also been allowed to recover the full amount of the policy not exceeding the value of the property though in excess of the unpaid purchase money.[206] Where the vendee is still liable for the price such a holding seems erroneous. An assured vendor of realty who has conveyed the premises but is seeking to set aside the deed for fraud cannot recover the value of the building or of possession in the absence of a writ for possession.[207] A vendee

[198] Hadley *v.* Insurance Co., 55 N. H. 110.

[199] Harris *v.* Gaspee F. & M. Co., 9 R. I. 207.

[200] Foster *v.* Equitable Ins. Co., 2 Gray (Mass.), 216.

[201] *New York:* Kent *v.* Ætna Ins. Co., 84 App. Div. 428, 82 N. Y. Supp. 817; Uhfelder *v.* Ins. Co., 44 Misc. 153, 89 N. Y. Supp. 792.

Pennsylvania: Rex *v.* Merchants' Ins. Co., 2 Phila. 357.

[202] Excelsior F. I. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

[203] Clark *v.* New England M. F. I. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 441.

[204] Shotwell *v.* Jefferson Ins. Co., 5 Bosw. (N. Y.) 247.

[205] *Maine:* Grant *v.* Elliot M. F. I. Co., 76 Me. 514.

Pennsylvania: Insurance Co. *v.* Updegraff, 21 Pa. 51, 59 Am. Dec. 749.

England: Collingridge *v.* Royal Exchange Assur. Corp., 3 Q. B. D. 173.

[206] *Massachusetts:* Boston, etc., Ice Co. *v.* Royal Ins. Co., 12 Allen, 381, 90 Am. Dec. 151.

Pennsylvania: Burson *v.* Fire Assoc., 136 Pa. 267, 20 Atl. 401, 20 Am. St. Rep. 919.

[207] Monroe *v.* Southern M. I. Co., 63 Ga. 669.

who has entered into possession but has not yet received a conveyance or paid the whole of the purchase price may recover the full value of the building to the extent of the sum insured.[208]

A reversioner who has given to the lessee an option to purchase is entitled to the full value of the property at the time of the fire.[209] Where a lessee is bound to restore the premises in their original condition at the expiration of the term,[210] or where the lessee has erected buildings upon the demised premises with privilege of removal, the amount of recovery is the actual cash value of the property as it stood before the fire, but not merely the value of the buildings for purposes of removal.[211] Otherwise, however, the insurable interest of a lessee for years is the value of his lease, and that is the measure of his recovery [212] unless the policy is so issued as to cover the interests of both lessor and lessee.[213] As to the measure of damages upon a policy issued to a life tenant the authorities are in conflict. The true rule seems to be the full amount of the damage to the premises not exceeding the amount of the policy,[214] for the interest of a life tenant is not accurately measurable and those cases which award damages upon the basis of the assured's expectancy of life [215] do not guarantee complete indemnity.

Recovery by a part owner or tenant in common should be

[208] Ætna Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90.

[209] Planters' M. I. Co. *v.* Rowland, 66 Md. 236.

[210] Imperial F. I. Co. *v.* Murray, 73 Pa. 13.

[211] *New York:* Laurent *v.* Chatham Ins. Co., 1 Hall, 41.

Ohio: Merchants' Ins. Co. *v.* Frick, 2 Am. L. Rec. 336.

See *United States:* Washington Mills M. Co. *v.* Commercial F. I. Co., 13 Fed. 646.

Massachusetts: Washington Mills E. M. Co. *v.* Weymouth & B. I. Co., 135 Mass. 503.

[212] Niblo *v.* North American F. I. Co., 1 Sandf. (N. Y.) 551.

[213] Home Ins. Co. *v.* Gibson, 72 Miss. 58, 17 So. 13, 48 Am. St. Rep. 535.

[214] *Illinois:* Andes Ins. Co. *v.* Fish, 71 Ill. 620.

Iowa: Merrett *v.* Farmers' Ins. Co., 42 Ia. 11.

Pennsylvania: Welsh *v.* London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

Canada: Caldwell *v.* Stadacona F. & L. I. Co., 11 Can. 212.

[215] *Kentucky:* Agricultural Ins. Co. *v.* Yates, 10 Ky. L. Rep. 984; Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64.

New York: Beekman *v.* Fulton Counties Farmers' Mut. F. Ins. Assoc., 66 App. Div. 72, 73 N. Y. Supp. 110.

See also *Massachusetts:* Doyle *v.* American F. Ins. Co., 181 Mass. 139, 145, 63 N. E. 394 (recovery by tenant by courtesy initiate estimated accord-

limited by the value of his interest unless the policy is for the benefit of all concerned.[216] A carrier who is liable to the owner may recover the full value of the property insured.[217]

§ 726. Clauses limiting liability.

Unless the policy contains provisions to the contrary the insured under a fire policy may recover from any underwriter the full amount of damage to the property up to the amount of the insurance.[218] Frequently, however, recovery is expressly limited to a definite fraction of the cash value of the property, or to such proportion of the loss as the sum underwritten bears to the whole amount of insurance upon the property. Apart from statutes these conditions are valid. Where by law or by the terms of the policy only a certain proportion of the total value of property is to be insured, that proportion is to be determined by the value at the time of the loss, and not by the value stated in the policy.[219] Clauses providing for a pro-rating of the loss among the various insurers apply only to insurance in force at the time of the loss [220] and covering the same interest in the same property.[221] Thus policies taken out by mortgagee and mortgagor do not constitute double insurance,[222] but where a policy is taken by a warehouseman upon goods "his own or held in trust" and the owner also insures, the loss must be apportioned between the two companies.[223] Occasionally a policy

ing to the life expectancies of both the assured and his wife).

[216] Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547; Clement *v.* British-America Assur. Co., 141 Mass. 298, 5 N. E. 847.

[217] Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. Rep. 703.

[218] *Kentucky:* London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Missouri: Clem *v.* German Ins. Co., 36 Mo. App. 560.

[219] *Massachusetts:* Post *v.* Hampshire M. F. I. Co., 12 Met. 555, 46 Am. Dec. 702. (But see Ellis *v.* Albany City Ins. Co., 4 Met. 206; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350.)

New Hampshire: Atwood *v.* Union M. F. I. Co., 28 N. H. 234; Huckins *v.* People's M. F. I. Co., 31 N. H. 238.

[220] Hoffman *v.* Insurance Co., 88 Tenn. 735, 14 S. W. 72.

[221] Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355.

[222] *Illinois:* Niagara F. I. Co. *v.* Scammon, 144 Ill. 490, 28 N. E. 919.

Kentucky: Home Ins. Co. *v.* Koob, 113 Ky. 360, 68 S. W. 453, 24 Ky. L. Rep. 223, 101 Am. St. Rep. 354, 58 L. R. A. 58.

New Hampshire: Tuck *v.* Hartford F. Ins. Co., 56 N. H. 326.

[223] Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868; Robbins *v.* Firemen's Fund Ins. Co., 20

may contain a clause of double limitation. Thus under a policy of fire insurance for $2,000, on property insured elsewhere for $3,000, which contained the following provisions: "When property is insured by this company solely, three-fourths only of the value will be taken; and in cases of loss this company will be liable to pay three-fourths only of the value at the time of the loss, but in no case more than is insured by this company. In case of loss or damage of property on which authorized double insurance subsists, this company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three-fourths of the actual value of the property at the time of the loss," the plaintiff was held, by the Supreme Court of Massachusetts, entitled to recover only two-fifths of three-fourths of the loss.[224] Many interesting cases have arisen as to the apportionment of losses on property covered by both specific and blanket policies, the latter also including other property, but an analysis of these authorities is beyond the scope of the present work.[225]

Where a single policy insures several different classes of property for separate amounts indemnity for any class is limited to the fund assigned to it and an excessive loss on one class cannot be made up out of another.[226]

§ 727. Breach of contract to issue policy.

A contract to execute a fire policy is a proper subject for

Fed. Cas. No. 11,881, 16 Blatchf. 122.

[224] Haley *v.* Dorchester M. & F. I. Co., 12 Gray (Mass.), 545.

[225] See the following cases:

United States: Page *v.* Sun Ins. Office, 74 Fed. 203, 20 C. C. A. 397, 33 L. R. A. 249.

Connecticut: Schmaelzle *v.* London, etc., F. Ins. Co., 75 Conn. 397, 53 Atl. 763, 96 Am. St. Rep. 233, 60 L. R. A. 536.

Iowa: Erb *v.* Fidelity Ins. Co., 99 Ia. 727, 69 N. W. 261; Lesure Lumber Co. *v.* Mutual F. I. Co., 101 Ia. 514, 70 N. W. 761.

New York: Mayer *v.* American Ins. Co., 2 N. Y. Supp. 227; Ogden *v.* East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492.

Canada: Toronto First Unitarian Congregation *v.* Western Assur. Co., 26 U. C. Q. B. 175.

[226] *United States:* Carlwitz *v.* Germania F. Ins. Co., 5 Fed. Cas. No. 2,415*a*.

Alabama: Home Ins. Co. *v.* Adler, 71 Ala. 516.

Kentucky: Ætna Ins. Co. *v.* Glasgow E. L. Co., 107 Ky. 77, 52 S. W. 975, 21 Ky. L. Rep. 726.

specific performance and when a loss has occurred before the filing of the bill, equity, in order to avoid multiplicity of suits, will decree the payment of the same damages as would be recoverable at law.[227] It has also been held that in a suit at law for refusal to issue a policy, the measure of damages after a fire is the same amount as would have been recovered had the policy been issued.[228]

§ 728. Reinsurance.

An insurer frequently finds it advisable to secure protection from loss by reinsuring in another insurance company. The insurer still remains liable upon the original contract, but is indemnified against loss by the reinsurer. Upon a loss happening, the original insurer, upon a principle that will be discussed in a later chapter, may at once sue the reinsurer and recover the amount of the loss, without first having paid it.[229] It has been held that this may be done even if the insurer is insolvent and unable to pay the claim [230] or has paid but a small portion of the amount of the judgment.[231] But if the insurer has adjusted the loss without suit, he can recover no more than the amount he has paid.[232] Upon claim being brought against the insurer, notice may be given to the reinsurer, whose duty it then becomes either to contest the claim or to adjust it.[233] In a case of this sort [234] Story, J., said:

"If notice of a suit, threatened or pending, upon the original

[227] *United States:* Tayloe *v.* Merchants' Ins. Co., 9 How. 390, 13 L. ed. 187.

Kentucky: Security Ins. Co. *v.* Kentucky Ins. Co., 7 Bush, 81, 3 Am. Rep. 301.

Maryland: Phœnix Ins. Co. *v.* Ryland, 69 Md. 437, 16 Atl. 109.

[228] *New York:* Post *v.* Ætna Ins. Co., 43 Barb. 357; Angell *v.* Hartford F. I. Co., 59 N. Y. 171, 17 Am. Rep. 322.

Wisconsin: Campbell *v.* American F. I. Co., 73 Wis. 100, 40 N. W. 661.

See *ante*, § 623.

[229] *Indiana:* Eagle Insurance Co. *v.* Lafayette Insurance Co., 9 Ind. 443.

Missouri: Gantt *v.* American Central Ins. Co., 68 Mo. 503, 30 Am. Rep. 802.

New York: Blackstone *v.* Alemannia F. I. Co., 56 N. Y. 104. See chap. xxxvi.

[230] *Missouri:* Strong *v.* American Cent. Ins. Co., 4 Mo. App. 7.

New York: Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137.

[231] Consolidated Ins. Co. *v.* Cashow, 41 Md. 59.

[232] Illinois Mut. F. I. Co. *v.* Andes Insurance Co., 67 Ill. 362, 16 Am. Rep. 620.

[233] New York C. I. Co. *v.* National Protection I. Co., 20 Barb. (N. Y.) 468.

[234] N. Y. State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story, 458, 462.

policy, be given to the reassurers, they have a fair opportunity to exercise an election whether to contest or admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party reassured to compromise or settle it, they must be deemed to require that it should be carried on; and then, by just implication, they are held to indemnify the party reassured against the costs and expenses necessarily and reasonably incurred in defending the suit.

"If they decline to interfere at all, or are silent, they have no right afterwards to insist that the costs and expenses of the suit ought not to be borne by them, as they are exclusively under such circumstances incurred for the benefit of the reassurers, and are indispensable for the protection of the party reassured."

The Supreme Court of Missouri, after quoting this language with approval, added: [235]

"Such defence when made in good faith, for the protection of the reinsurers, will render any judgment obtained by the original assured in such suit, binding upon the reinsurers, as to all matters which could have been litigated therein, and make them liable also for the costs and expenses of the litigation. It necessarily follows that in all cases where the reinsurers fail, after notice, to participate in the defence, the original insurer, by operation of law, becomes *sub modo* their agent for the management of such defence, and in the conduct thereof is bound to exercise the utmost good faith: and any judgment against him, collusively obtained, would not support a recovery over against the reinsurers."

If the original insurer fails to notify the reinsuring company of an action by the assured it cannot recover the expenses of successfully defending the same.[236]

III.—Life Insurance

§ 729. Life insurance not a contract of indemnity.

* Contracts of assurance on lives form another very impor-

[235] Gantt *v.* American Central Ins. Co., 68 Mo. 503, 535, 30 Am. Rep. 802, per Hough, J.

[236] Faneuil Hall Ins. Co. *v.* Liverpool Ins. Co., 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423, 25 Am. St. Rep. 611.

tant division of this branch of our subject. Where the policy was taken out on the life of a third person, it was originally said that, like marine and fire policies, it was a mere contract of indemnity;[237] that if not damnified, the plaintiff could not recover; and so, where the creditors of Mr. Pitt had effected an insurance on his life, and their debts had been subsequently paid, it was held that they could not recover.[238] But this case has been overruled; and it has been decided that a contract of life assurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the payment of certain premiums; that it is not a contract of indemnity;[239] and that the termination of a creditor's interest before the death does not defeat the recovery.[240] ** So too where husband and wife took a policy on their joint lives payable to the survivor, the wife was allowed to recover though the death of the husband occurred after a divorce.[241] It must be remembered, however, that the modern doctrine is anomalous and that life insurance still so retains its character as a contract of indemnity as to require an insurable interest at the time of the issuance of the policy.

Since the value of a life is not calculable in terms of money, a policy on life is deemed valued and the sum insured is the measure of damages.[242] But as the interest of a creditor in the life of his debtor is accurately measurable it would seem that his recovery should be limited to the amount of the debt with interest and cost of maintaining insurance. However, the law is otherwise and the face of the policy is recoverable though exceeding the debt.[243] Policies frequently stipulate that the bal-

[237] Bevin *v.* Connecticut M. L. I. Co., 23 Conn. 244.

[238] Godsall *v.* Boldero, 9 East, 72, cited, with approbation, in Tyler *v.* Ætna Fire Ins. Co., 12 Wend. 507.

[239] *Acc.*, Trenton M. L. & F. I. Co. *v.* Johnson, 24 N. J. L. 576, 585.

[240] *United States:* Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64.

New York: Rawls *v.* American M. L. I. Co., 27 N. Y. 282, 84 Am. Dec. 280.

Rhode Island: Mowry *v.* Home L. Ins. Co., 9 R. I. 346, 354.

England: Law *v.* London I. L. P. Co., 1 K. & J. 223; Dalby *v.* India & London Life Assurance Co., 15 C. B. 365.

[241] Connecticut M. L. I. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251.

[242] Loomis *v.* Eagle Ins. Co., 6 Gray (Mass.), 396.

[243] *Massachusetts:* Forbes *v.* American Mut. L. Ins. Co., 15 Gray, 249, 254, 77 Am. Dec. 360.

Mississippi: Natchez Ins. Co. *v.* Buckner, 4 How. 63.

ance after payment of the debt to the named creditor shall inure to the benefit of the debtor's estate.[244] Where a partnership consisting of A and B took a policy on the life of B and was subsequently dissolved, all the assets being assigned to A, it was held that A's beneficial interest in the policy was limited to the amount of B's indebtedness to the partnership with interest and the amount expended to preserve the policy, the balance going to B's estate.[245]

§ 730. Refusal to issue or continue a policy.

Where an insurance company breaks a contract to issue a paid-up policy, the measure of damages is the cost of reinsuring in a first-rate company, or if the plaintiff is not insurable at the time, the value of the policy.[246] So where a company agrees, on the payment of the third annual premium due on a life insurance policy, to issue a paid-up policy and fails to do so, the measure of damages is the difference in value between a paid-up policy and the life policy held by the plaintiff.[247] It has been held in some cases that if the company breaks the conditions of its policy or repudiates it the measure of damages is not what it would cost the plaintiff to reinsure, but the whole amount of the premiums paid by him with interest; [248] which amounts to a

New York: Hoyt *v.* New York L. I. Co., 3 Bosw. 440.

[244] *Maryland:* Rittler *v.* Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.

New York: Goodwin *v.* Mass. M. L. I. Co., 73 N. Y. 480, 497.

Pennsylvania: American L. & H. I. Co. *v.* Robertshaw, 26 Pa. 189.

[245] Cheeves *v.* Anders, 87 Tex. 287, 22 S. W. 274, 47 Am. St. Rep. 107.

[246] *Illinois:* Phœnix M. L. I. Co. *v.* Baker, 85 Ill. 410.

Kansas: Missouri V. L. I. Co. *v.* Kelso, 16 Kan. 481.

Missouri: Rumbold *v.* Penn M. L. I. Co., 7 Mo. App. 71.

Nebraska: Union C. L. I. Co. *v.* McHugh, 7 Neb. 66.

New York: Speer *v.* Phœnix M. L. I. Co., 36 Hun, 322; Farley *v.* Union M. L. I. Co., 41 Hun, 303. So in an action for conversion of a policy. Barney *v.* Dudley, 42 Kan. 212, 16 Am. St. Rep. 476.

[247] American L. I. & T. Co. *v.* Shultz, 82 Pa. 46.

[248] *Georgia:* Alabama G. L. I. Co. *v.* Garmany, 74 Ga. 51.

Illinois: Ætna L. I. Co. *v.* Paul, 10 Ill. App. 431.

Iowa: Van Werden *v.* Equitable L. Ass. Society, 99 Ia. 621, 68 N. W. 892.

Michigan: Frain *v.* Metropolitan L. I. Co., 67 Mich. 527, 35 N. W. 108.

Missouri: McKee *v.* Phœnix Ins. Co., 28 Mo. 383, 75 Am. Dec. 129; Suess *v.* Imperial L. I. Co., 64 Mo. App. 1.

New York: Fischer *v.* Hope M. L. I. Co., 69 N. Y. 161, 25 Am. Rep. 162; Meade *v.* St. Louis M. L. I. Co., 51 How. Pr. 1.

North Carolina: Braswell *v.* American

rescission of the contract and a recovery by the assured of the entire consideration paid by him, without allowance for the risk taken by the company. The better measure would seem to be the increased cost of reinsuring, if the assured is still insurable, during the life of the policy; if, however, the assured has become uninsurable, then his measure of damages will be the present value of his policy as of the date of death, less the estimated cost of carrying the same, from the date of cancellation, at his then age.[249] But if the repudiated policy was a tontine or investment policy or where the assured is entitled to accumulations and profits, the plaintiff is further entitled to all such profits or accumulations.[250]

Upon breach of the policy by the insurer transferring its business to another company and going out of business, the assured may recover the value of the policy.[251] The same rule is applicable when the insurer becomes insolvent.[252] In determining the value, the health of the assured, if it is a life policy, and all other facts tending to show what it would cost him to replace himself, should be taken into account.[253] The items

L. I. Co., 75 N. C. 8; Burrus *v.* Life Ins. Co., 124 N. C. 9, 32 S. E. 323.

Ohio: Union Central L. I. Co. *v.* Bernard, 33 Ohio St. 459, 31 Am. Rep. 555.

Oregon: Thompson *v.* New York L. I. Co., 21 Ore. 466, 28 Pac. 628.

Pennsylvania: American L. I. Co. *v.* McAden, 109 Pa. 399, 1 Atl. 256.

West Virginia: McCall *v.* Phœnix M. L. I. Co., 9 W. Va. 237, 27 Am. Rep. 558.

[249] *United States:* New York L. I. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789; Lovell *v.* St. Louis M. L. I. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. ed. 423; Mutual R. F. L. Assoc. *v.* Ferrenbach, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163.

Connecticut: Day *v.* Conn. G. L. I. Co., 45 Conn. 480, 29 Am. Rep. 693.

Illinois: Brooklyn L. I. Co. *v.* Week, 9 Ill. App. 358.

Indiana: Continental L. I. Co. *v.* Houser, 89 Ind. 258.

Minnesota: Ebert *v.* Mutual R. F. L. Assoc., 81 Minn. 116, 83 N. W. 506, 84 N. W. 457.

Missouri: Smith *v.* Charter Oak L. I. Co., 64 Mo. 330.

New York: Speer *v.* Phœnix M. L. I. Co., 36 Hun, 322.

Pennsylvania: Marshall *v.* Franklin L. I. Co., 176 Pa. 628, 35 Atl. 204, 34 L. R. A. 159.

Texas: Piedmont L. I. Co. *v.* Fitzgerald, 1 Tex. Civil Cas. 784, 788.

Virginia: Universal L. Ins. Co. *v.* Binford, 76 Va. 103.

[250] *United States:* Krebs *v.* Security T. & L. I. Co., 156 Fed. 294.

West Virginia: Abell *v.* Penn M. L. I. Co., 18 W. Va. 400.

[251] Union C. L. I. Co. *v.* Poettker, 4 Am. Law Rec. 109.

[252] People *v.* Security L. I. & A. Co., 78 N. Y. 114, 34 Am. Rep. 522.

[253] Universal L. I. Co. *v.* Binford, 76 Va. 103.

See, also, Attorney-General *v.* Guard-

which go to make up the value of a policy were considered in New York Life Insurance Co. *v.* Statham.[254] The assured had, in that case, been prevented by the war of the rebellion from paying the premiums. It would seem that if the war did not excuse the non-payment, the policy should, according to its terms, have lapsed; if the war excused the non-payment, then it would seem that the policy must have been in force at the time of the death of the assured. But the Supreme Court took a different view, holding that the plaintiff could recover the equitable value of the policy at the time of the first default, with interest from the close of the war, and that there should be no deduction as in the case of surrendered policies. As to the method of determining the value, the court said: "In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation." In case of a mutual insurance company the reserve fund for the policy under consideration must be considered in determining its value.[255] Where the defendant refused to receive the premium for a policy on account of the breaking out of the war, the plaintiff residing in Virginia (the offer to pay the premium being made before the proclamation of non-intercourse with that State), it was held that the subsequent enlistment of the plaintiff in the confederate army did not annul the contract, and that the measure of his damages was the value of the policy at the time of refusal, with interest.[256]

§ 731. Accident insurance.

The same principle which prevents recovery for loss of rents in case of fire insurance prevents recovery for loss of time or of profits in an action on an accident insurance policy. The risk insured against is physical accident, compensation for which is the expense of curing the injury and the pain of it. So where in a suit on a policy of insurance, by which £1,000 was to be paid to the representatives of the assured, in case of his death by railway accident, and a proportionate part of that sum to him in case of his injury by such accident, the injury had fallen short

ian M. L. I. Co., 82 N. Y. 336; Clemmitt *v.* New York L. I. Co., 76 Va. 355 (life terminated before judgment).

[254] 93 U. S. 24, 23 L. ed. 789.

[255] Nashville L. I. Co. *v.* Mathews, 8 Lea (Tenn.), 499.

[256] Smith *v.* Charter Oak L. I. Co., 64 Mo. 330.

of death, it was held not to be a true measure of damages to assume the sum insured as the value of the life, and to estimate a proportionate sum for the injury. In such a case, the measure of damages is the amount of injury the plaintiff has sustained as a *direct consequence* of the accident, *i. e.*, compensation for the pain and medical expense; but loss of time or profits in such a case are not regarded.[257] Pollock, C. B., said:

"We think that, in considering the damage done to the traveller, the consequential mischief of losing some profit is not to be taken into consideration; otherwise, a passenger whose time or business is more valuable than that of another would for precisely the same personal injury receive a greater remuneration than that other. What the insurance company calculate on indemnifying the party against is the expense and pain and loss immediately connected with the accident, and not remote consequences that may follow according to the business or profession of the passenger."

It is to be noted, however, that accident policies usually expressly insure against loss of time and stipulate a liquidated periodic indemnity.[258] In such a case the fact that the employer of the assured allows him wages during the time he is incapacitated does not prevent recovery of the agreed indemnity.[259]

§ 732. Assessment policies.

Where an assessment insurance company, which pays, in case of loss, the whole or part of an amount levied upon its members by assessment, refuses to levy an assessment to pay the plaintiff's claim, the plaintiff may maintain an action at law against the company, and recover the amount assessable on policy-holders up to the amount of his claim, unless the company alleges and proves that a less amount would have been paid in by the policy-holders.[260]

[257] Theobald *v.* Railway Passenger Assurance Co., 10 Ex. 45, 57.

[258] Bean *v.* Travelers' Ins. Co., 94 Cal. 581, 29 Pac. 1113.

[259] Globe Acc. Ins. Co. *v.* Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

[260] *United States:* United States M. A. Assoc. *v.* Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. ed. 60; Lueders *v.* Hartford L. I. Co., 4 McCr. 149.

Arkansas: Masons' Fraternal Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

In O'Brien *v.* Home Benefit Society,[261] Earl, J., said:

"The plaintiff was entitled to recover something, and what was the measure of his damages? Just what he lost by the defendant's breach of its contract. He was entitled to have an assessment made and collected, and the proceeds thereof paid to him. What was the contract worth to him, and what would the assessment have produced for him? It was incumbent upon the plaintiff to give evidence which would enable the jury to answer these questions. As the assessment was not made, it was impossible for the plaintiff to show accurately or precisely what such an assessment would have produced. He was bound to give such evidence as the nature of the case permitted bearing upon the matter of damages, and legitimately tending to prove their amount."

The reason for allowing the plaintiff to recover substantial damages is that, although it is not in his power to establish what would have been paid in, the presumption is, nothing appearing to the contrary, that the money would have been collected.

Connecticut: Lawler *v.* Murphy, 58 Conn. 294.

Illinois: Covenant M. B. Assoc. *v.* Hoffman, 110 Ill. 603.

Indiana: Elkhart M. A. Assoc. *v.* Houghton, 103 Ind. 286, 53 Am. Rep. 514.

Iowa: Newman *v.* Covenant M. I. Co., 76 Ia. 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 56 (overruling Newman *v.* Covenant Mutual Benefit Association, 72 Ia. 242, which allowed only nominal damages); Hart *v.* National M. A. Assoc., 105 Ia. 717, 75 N. W. 508.

Kansas: Kansas Protective Union *v.* Whitt, 36 Kan. 760, 59 Am. Rep. 607.

Michigan: Burland *v.* Mutual Benefit Assoc., 47 Mich. 424.

Minnesota: Kerr *v.* Minnesota M. B. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202.

Missouri: Taylor *v.* National T. R. Union, 94 Mo. 35; McFarland *v.* United States M. A. Assoc., 124 Mo. 204, 27 S. W. 436.

Nebraska: Modern Woodman Acc. Assoc. *v.* Shryock, 54 Neb. 250; 74 N. W. 607, 39 L. R. A. 826.

New York: O'Brien *v.* Home Benefit Society, 117 N. Y. 310; Freeman *v.* National Benefit Society, 42 Hun, 252.

[261] 117 N. Y. 310, 319, 22 N. E. 954.

CHAPTER XXXV

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I.—Breach by Vendor

§ 733. Introductory.

* We now approach the consideration of a large class of cases falling under the head of the common-law action of assumpsit,—that of contracts for the sale of chattels or personal property. These contracts may be broken, either completely, by the vendor's neglect to deliver the article, or by the vendee refusing to pay the price; or partially, by the article proving different from some warranty made in regard to it at the time of sale. Generally, it may be said that these agreements furnish their own measure of damages; in other words, that courts of justice, without desiring to fix any arbitrary rate of remuneration, endeavor solely to carry into effect the contract of the parties; and to this rule the only exception that can be said to exist is that in regard to agreements of an unconscionable and oppressive character, which we have already considered.[1] **

§ 733a. Rescission.

When the vendor himself makes performance of the contract impossible, as by converting to his own use the property which he has agreed to deliver, or tendering inferior goods, the vendee has a choice of remedies. He may treat the contract as rescinded and sue to recover back the consideration, or he may sue for damages for breach of the agreement.[2] If he elects to

[1] § 612.

[2] *United States:* Nash *v.* Towne, 5 Wall. 689, 701, 18 L. ed. 527; Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620, 55 U. S. App. 96, 109; Smiley *v.* Barker, 83 Fed. 684, 28 C. C. A. 9, 55 U. S. App. 125, 133.

Pennsylvania: Byrne *v.* Elfreth, 41 Pa. Sup. Ct. 572.

England: Anon., 1 Strange, 407.

This is said to be derived from a universal principle, applicable to all contracts not under seal. Ankeny *v.* Clark, 148 U. S. 345, 37 L. ed.

rescind, his recovery is limited to the consideration paid, together with any expense he may have been caused, such as payment of freight; but since he has chosen to put an end to the obligation from the beginning he cannot complain of any result of the failure to furnish the goods, such as loss of use of them.[3]

§ 734. General rule.

* We have first to consider the cases arising from the failure of the seller to perform his agreement. When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when ** and the place where it should have been delivered, with interest.[4] Where the parties agreed to exchange

475, 13 Sup. Ct. 617. See *supra*, § 654.

[3] Houser & H. M. Co. *v.* McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925, and cases cited.

[4] *United States:* Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139; Blydenburgh v. Welsh, Baldwin, 331; Barnard *v.* Conger, 6 McLean, 497; Halsey *v* Hurd, 6 McLean, 102; Gilpin *v.* Consequa, Pet. C. C. 85; Missouri Furnace Co. *v.* Cochran, 8 Fed. 463; Haff *v.* Pilling, 134 Fed. 294.

Alabama: McGhee *v.* Posey, 42 Ala. 330; Neel *v.* Clay, 48 Ala. 252; Harralson *v.* Stein, 50 Ala. 347; Bozeman *v.* Rose, 51 Ala. 321; Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Haas *v.* Hudmon, 83 Ala. 174; Clements *v.* Beatty, 87 Ala. 238, 6 So. 151; Young *v.* Cureton, 87 Ala. 727, 6 So. 352; Ala. Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

Arkansas: Leach *v.* Smith, 25 Ark. 246; Bunch *v.* Potts, 57 Ark. 257, 21 S. W. 437; Border City Ice & Coal Co. *v.* Adams, 69 Ark. 219, 62 S. W. 591; Walnut R. M. Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413 (anticipatory breach accepted by plaintiff, damages are difference between contract and market price on day of such acceptance); L. N. Lanier & Co. *v.* Little Rock Cooperage Co., 88 Ark. 557, 115 S. W. 401.

California: Tobin *v.* Post, 3 Cal. 373; Crosby *v.* Watkins, 12 Cal. 85, 73 Am. Dec. 518; Bullard *v.* Stone, 67 Cal. 477; Rayner *v.* Jones, 90 Cal. 78, 27 Pac. 24; Russ *v.* Tuttle, 158 Cal. 224, 110 Pac. 813; Fairchild-Gilmore-Wilton Co. *v.* Southern Refining Co., 158 Cal. 264, 110 Pac. 951; Connell *v.* Harron, 7 Cal. App. 745, 95 Pac. 916; Cal. Code, §§ 3308, 3354.

Colorado: Cole *v.* Cheovenda, 4 Colo. 17; Staab *v.* Borax Soap Co., 12 Colo. App. 286, 55 Pac. 618.

Connecticut: Crug *v.* Gorham, 74 Conn. 541, 51 Atl. 519.

Delaware: Love *v.* Barnsville Mfg. Co., 3 Pennew. 152, 50 Atl. 526.

District of Columbia: McAllister *v.* Douglas, 1 D. C. (1 Cr. C. C.) 241.

Florida: Robinson *v.* Hyer, 35 Fla. 544, 577, 17 So. 745.

Georgia: Southwestern R. R. *v.*

property, and the defendant refused to carry out the agreement, the measure of damages is the difference between the

Rowan, 43 Ga. 411; Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513; Wappoo Mills *v.* Commercial Guano Co., 91 Ga. 396, 18 S. E. 308; Pitcher *v.* Lowe, 95 Ga. 423, 429, 22 S. E. 678; Piedmont Wagon Co. *v.* Hudgens, 4 Ga. App. 393, 61 S. E. 835; Trigg Candy Co. *v.* Emmett Shaw Co. (Ga. App.), 71 S. E. 679; Wright *v.* Vaughan, 72 S. E. 412.

Illinois: Sleuter *v.* Wallbaum, 45 Ill. 43; Smith *v.* Dunlap, 12 Ill. 184; Deere *v.* Lewis, 51 Ill. 254; Richard *v.* Shaw, 67 Ill. 222; Kitzinger *v.* Sanborn, 70 Ill. 146; Driggers *v.* Bell, 94 Ill. 223; Trunkey *v.* Hedstrom, 131 Ill. 204, 23 N. E. 587; Loescher *v.* Deisterberg, 26 Ill. App. 520; Delaware & Hudson Canal Co. *v.* Mitchell, 92 Ill. App. 577; Whitsell *v.* Rising, 109 Ill. App. 91.

Indiana: Parks *v.* Marshall, 10 Ind. 20; Gatling *v.* Newell, 12 Ind. 118, 125 (*semble*); Zehner *v.* Dale, 25 Ind. 433; Frink *v.* Tatman, 36 Ind. 259, 10 Am. Rep. 19; McCollum *v.* Huntington, 51 Ind. 229; Fell *v.* Muller, 78 Ind. 507; Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495; Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141.

Iowa: Cannon *v.* Folsom, 2 Ia. 101; Boies *v.* Vincent, 24 Ia. 387; Jemmison *v.* Gray, 29 Ia. 537; Osgood *v.* Bauder, 75 Ia. 550, 39 N. W. 887; Black *v.* De Camp, 78 Ia. 718, 43 N. W. 625; Faulkner *v.* Closter, 79 Ia. 15, 44 N. W. 208; Laporte Improvement Co. *v.* Brock, 99 Ia. 485, 68 N. W. 810; Welch *v.* Urvany, 112 Ia. 531, 84 N. W. 497; Chesmore *v.* Barker, 101 Ia. 576, 70 N. W. 701; H. D. Wetmore & Co. *v.* Henry, 124 N. W. 791.

Kansas: Gray *v.* Hall, 29 Kan. 704; York D. M. Co. *v.* Lusk, 45 Kan. 182, 25 Pac. 646; Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444; York-Draper Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788.

Kentucky: Mudd *v.* Phillips, Litt. Sel. Cas. 50; Dills *v.* Dougherty, 6 Dana, 253; Koch *v.* Godshaw, 12 Bush, 318; Miles *v.* Miller, 12 Bush, 134; Guenther *v.* Taylor, 63 S. W. 439, 23 Ky. L. Rep. 536; Parry Mfg. Co. *v.* Lyon, 111 Ky. 613, 64 S. W. 436.

Louisiana: Marchesseau *v.* Chaffee, 4 La. Ann. 24; Thompson *v.* Howes, 14 La. Ann. 45; Hafner Mfg. Co. *v.* Lieber L. & S. Co., 127 La. 348, 53 So. 646.

Maine: Smith *v.* Berry, 18 Me. 122; Bush *v.* Holmes, 53 Me. 417; Bell *v.* Jordan, 112 Me. 67, 65 Atl. 759.

Maryland: Kribs *v.* Jones, 44 Md. 396; Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450; McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415.

Massachusetts: Shaw *v.* Nudd, 8 Pick. 9; Bartlett *v.* Blanchard, 13 Gray, 429; Essex M. Co. *v.* Pacific Mills, 14 All. 380, 92 Am. Dec. 777; Meserve *v.* Ammidon, 109 Mass. 415.

Michigan: Clark *v.* Moore, 3 Mich. 55; Haskell *v.* Hunter, 23 Mich. 305; McKercher *v.* Curtis, 35 Mich. 478; Chadwick *v.* Butler, 28 Mich. 349; Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 359; Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119; Trotter *v.* Tousey, 131 Mich. 624, 92 N. W. 544; Pittsburgh Coal Co. *v.* Northy, 158 Mich. 530, 123 N. W. 47.

Minnesota: Olson *v.* Sharpless, 53 Minn. 91, 55 N. W. 125; Hewson-Herzog Supply Co. *v.* Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129; Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Coxe Bros. & Co. *v.* Anoka Water Works, 91 Minn. 50, 97 N. W. 459.

Missouri: Northrup *v.* Cook, 39 Mo. 208; Harrison Wire Co. *v.* Hall & W. H. Co., 97 Mo. 289; Warren *v.* A. B. Mayer Manuf. Co., 161 Mo. 112, 61 S. W. 644, 84 Am. St. Rep. 669, *n.*; Murphy *v.* St. Louis, 8 Mo. App. 483; Shouse *v.* Neiswaanger, 18 Mo. App. 236, 244; Smith

value of the defendant's property and that of the plaintiff.[5]

It follows from this rule, that if, at the time fixed for the

v. Keith & P. Coal Co., 36 Mo. App. 567; Wilson *v.* Russler, 91 Mo. App. 275; Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076; Barnett *v.* Elwood Grain Co. (Mo. App.), 133 S. W. 856.

Nebraska: Denver & R. G. R. R. *v.* Hutchins, 31 Neb. 572, 48 N. W. 398; Boyer *v.* Cox, 34 Neb. 813, 52 N. W. 715; Russell *v.* Horn, 41 Neb. 567, 59 N. W. 901; Graham *v.* Frazier, 49 Neb. 90, 68 N. W. 367; Carter *v.* Roberts, 85 Neb. 480, 124 N. W. 94.

New Hampshire: Stevens *v.* Lyford, 7 N. H. 360; Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087.

New York: Davis *v.* Shields, 24 Wend. 322; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Parsons *v.* Sutton, 66 N. Y. 92; Windmuller *v.* Pope, 107 N. Y. 674; Taylor *v.* Saxe, 134 N. Y. 67, 31 N. E. 258; Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14; Haddane Gr. Co. *v.* Brooklyn H. R. R., 186 N. Y. 247, 78 N. E. 858; Billings *v.* Vanderbeck, 23 Barb. 546; Williams *v.* Sherman, 48 Barb. 402; Leavenworth *v.* Packer, 52 Barb. 132; Townshend *v.* Shepard, 64 Barb. 41; Yorke *v.* Ver Planck, 65 Barb. 316; Brock *v.* Knower, 37 Hun, 609; Taylor *v.* Reed, 4 Paige, 561; Norton *v.* Wales, 1 Robt. 561; Beals *v.* Terry, 2 Sandf. 127; Wamsley *v.* Wamsley, 48 App. Div. 330, 62 N. Y. Supp. 954; Rosenthal *v.* Empire B. & S. Co., 123 App. Div. 503, 108 N. Y. Supp. 347; Thedford *v.* Herbert, 119 N. Y. Supp. 1025, 135 App. Div. 174; Brody *v.* Birnbaum, 108 N. Y. Supp. 581; Albert Gas Fixture Co. *v.* Kabat, 109 N. Y. Supp. 737; Barton-Child Co. *v.* Scarborough, 61 Misc. 334, 114 N. Y. Supp. 1043; Dunlevic *v.* Spangenberg, 121 N. Y. Supp. 299, 66 Misc. 354.

North Carolina: Whitsett *v.* Forehand, 79 N. C. 230; Crawford *v.* Geiser Manuf. Co., 88 N. C. 554; Indian M. J. C. Co. *v.* Ashville I. & C. Co., 134 N. C. 574, 47 S. E. 115; Tillinghast, Styles Co. *v.* Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621.

North Dakota: Talbott *v.* Boyd, 11 N. Dak. 81, 88 N. W. 1026.

Ohio: Smith *v.* Sloss M. L. Co., 57 Oh. St. 518, 49 N. E. 695; Lloyd Lumber Co. *v.* Solon, 17 Ohio C. Ct. 194.

Oregon: Livesley *v.* Johnson, 48 Ore. 40, 84 Pac. 1044.

Pennsylvania: Fessler *v.* Love, 43 Pa. 313; White *v.* Tompkins, 52 Pa. 363, 91 Am. Dec. 163; Billmeyer *v.* Wagner, 91 Pa. 92, 36 Am. Rep. 659; Culin *v.* Woodbury Glass Works, 108 Pa. 220; Arnold *v.* Blabon, 147 Pa. 372, 23 Atl. 575; Canovan *v.* Neeld, 189 Pa. 208, 42 Atl. 115; Kimports *v.* Breton, 193 Pa. 309, 44 Atl. 436; Bradley *v.* McHale, 19 Pa. Super. Ct. 300; Homesdale Ice Co. *v.* Lake L. I. Co., 81 Atl. 306.

South Carolina: Price *v.* Justrobe, Harper, 111; Davis *v.* Richardson, 1 Bay, 105.

Tennessee: Doak *v.* Snapp, 1 Coldw. 180; Harris *v.* Rodgers, 6 Heisk. 626.

Texas: Randon *v.* Barton, 4 Tex. 289; Duncan *v.* McMahan, 18 Tex. 597 (*semble*); Day *v.* Cross, 59 Tex. 595; Guice *v.* Crenshaw, 60 Tex. 344; Ullman *v.* Babcock, 63 Tex. 68.

Utah: California P. B. & L. Co. *v.* Wasatch Orchard Co., 117 Pac. 35.

Vermont: Worthen *v.* Wilmot, 30 Vt. 555; Hill *v.* Smith, 34 Vt. 535; Humphreysville Co. *v.* Vermont Copper Mining Co., 33 Vt. 92.

[5] *Colorado:* Montelius *v.* Atherton, 6 Colo. 224.

New York: Woodworth *v.* Curtis, 7 Wend. 112.

delivery, the article has not risen in value, the vendee having lost nothing can recover only nominal damages.[6] Accordingly, where goods are sold, and it is agreed that the market price shall be paid for them, damages for non-delivery are only nominal;[7] and the same is true where the price of the goods is by the contract to be fixed by appraisers at the time of delivery.[8] The plaintiff sold the defendant a slave, with an agreement that if the defendant wished to sell the slave, the plaintiff should have the privilege of repurchasing at the price paid by the defendant. The defendant sold the slave to a third party. The measure of damages was the difference between the market value of the slave at the time of the sale to the third party and the agreed price.[9]

The reason of the rule is usually said to be that this is the plaintiff's real loss, because with this sum he can go into the market and supply himself with the same article from another vendor.[10] Accordingly in an action brought by a retail coal dealer against a wholesaler for non-delivery of coal the measure of damages is the difference between the contract price and the

Virginia: Smith *v.* Snyder, 77 Va. 432; Smith *v.* Snyder, 82 Va. 614 (*semble*).

Washington: Sweeney *v.* Jamieson, 2 Wash. 254; Carney *v.* Vogel, 52 Wash. 571, 100 Pac. 1027; R. J. Menz Lumber Co. *v.* McNeeley, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007.

Wisconsin: Noonan *v.* Ilsley, 17 Wis. 314, 84 Am. Dec. 742; Starr *v.* Light, 22 Wis. 433; Hill *v.* Chipman, 59 Wis. 211; Seefeld *v.* Thacker, 93 Wis. 518, 67 N. W. 1142; Vogt *v.* Schienebeck, 122 Wis. 491, 100 N. W. 820; Southern F. & G. Co. *v.* McGeehan, 144 Wis. 130, 128 N. W. 879.

England: Peterson *v.* Ayre, 13 C. B. 353; Tyers *v.* Rosedale, etc., Co., L. R. 8 Ex. 305.

Ireland: O'Neill *v.* Rush, 12 Ir. L. 34.

Canada: Feehan *v.* Hallman, 13 Up. Can. Q. B. 440.

New Zealand: Fleming *v.* Grigg, 14 N. Z. 499.

[6] *Iowa:* Faulkner *v.* Closter, 79 Ia. 15, 44 N. W. 208.

New York: Currie *v.* White, 6 Abb. (N. S.) 352, 386.

Wisconsin: Merriman *v.* McCormick Harvesting Machine Co., 96 Wis. 600, 71 N. W. 1050, 65 Am. St. Rep. 83.

[7] Wire *v.* Foster, 62 Ia. 114.

[8] Koch *v.* Godshaw, 12 Bush (Ky.), 318.

[9] Brent *v.* Richards, 2 Gratt. (Va.) 539.

[10] *Iowa:* Laporte Improvement Co. *v.* Brock, 99 Ia. 485, 68 N. W. 810, 61 Am. St. Rep. 485.

Maine: Furlong *v.* Polleys, 30 Me. 491, 50 Am. Dec. 635.

New York: Dey *v.* Dox, 9 Wend. 129; Davis *v.* Shields, 24 Wend. 322; Beals *v.* Terry, 2 Sandf. 127; McKnight *v.* Dunlop, 5 N. Y. 537; Clark *v.* Dales, 20 Barb. 42; Belden *v.* Nicolay, 4 E. D. S. 14.

England: Owen *v.* Routh, 14 C. B. 327; Josling *v.* Irvine, 6 H. & N. 512.

wholesale market price, not the retail price.[11] When the article contracted for is not readily obtainable on the market at the place for delivery under the contract it has been held that the purchaser may recover the difference between the agreed price and the actual cost of procuring similar articles by due diligence.[12] So where in order to get the articles it becomes necessary for the buyer to manufacture them himself the cost of manufacture less the contract price is the measure of recovery,[13] and no allowance is to be made for manufacturer's profits.[14] It may be impossible to procure an article exactly like that contracted for; in that case the cost of the best available substitute will furnish the measure of damages, in addition to any consequential damages resulting from the substitution which were within the contemplation of the parties.[15] In an English case [16] the defendant had agreed to manufacture and sell to the plaintiff 2,000 pieces of gray shirtings. Upon a breach the plaintiffs in order to fill a sub-contract procured at an advanced price 2,000 pieces of shirting of a somewhat superior quality, after vainly endeavoring to find an exact equivalent of that due under the contract. The sub-vendees accepted this substitute but paid no extra price. The plaintiff recovered the difference between the contract price and

[11] *Connecticut:* Righter *v.* Clark, 60 Atl. 741.

New York: Kilpatrick *v.* William Whitmer & Sons, 118 App. Div. 98, 103 N. Y. Supp. 75.

[12] *United States:* Vulcan Iron Works Co. *v.* Roquemore, 175 Fed. 11, 99 C. C. A. 77.

Alabama: McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640.

Georgia: Hardwood Lumber Co. *v.* Adams, 134 Ga. 821, 68 S. E. 725, 32 L. R. A. (N. S.) 192.

Michigan: Den Bleyker *v.* Gaston, 97 Mich. 354, 56 N. W. 763.

New Jersey: Rhind *v.* Freedley, 74 N. J. L. 138, 64 Atl. 963.

New York: Miller *v.* Stern, 25 Misc. 690, 55 N. Y. Supp. 765; Lande *v.* A. G. Hyde & Sons, 66 Misc. 259, 121 N. Y. Supp. 258.

North Carolina: Hassard-Shord *v.* Hardison, 117 N. C. 60, 19 S. E. 728, 23 S. E. 96.

[13] *United States:* Dolph *v.* Troy Laundry Mach. Co., 28 Fed. 553.

Minnesota: Paine *v.* Sherwood, 21 Minn. 225, 19 Am. Rep. 215.

New York: Gallagher *v.* Baird, 54 App. Div. 398, 66 N. Y. Supp. 759.

Vermont: Forsyth *v.* Mann, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788.

[14] Pittsburg Sheet Manuf. Co. *v.* West Penn. Sheet Steel Co., 201 Pa. 150, 50 Atl. 935.

[15] Crowley *v.* Burns B. & M. Co., 100 Minn. 178, 110 N. W. 969.

[16] Hinde *v.* Liddell, L. R. 10 Q. B. 265. *Cf.* Hamilton *v.* Kirby, 199 Pa. 466, 49 Atl. 214.

the price he had paid for the substituted shirtings. In no case is it necessary that the vendee should actually purchase other goods to take the place of those which the vendor failed to deliver, in order to invoke the general rule as to damages.[17] The rule applies where there is a delivery of part only of the goods contracted for.[18] Where the vendor puts it out of his power to fulfil his contract of sale by selling a portion of the goods to a third party before the time stipulated for the delivery, the vendee in an action for the breach of the contract is entitled to the difference between the market value and the contract price, on all the goods contracted to be sold, and not merely those which the vendor had thus put it out of his power to deliver; [19] for the entire contract was broken by the vendor's act. The vendee could not be required to accept part only of the goods. Where the defendant contracted to deliver his crop of corn growing on about 30 acres of ground in merchantable order at a stipulated time and price, and one-fourth of the crop only turned out sound, and he refused to deliver that portion only, but insisted on delivering the whole, if any, it was held a breach of the contract, and the vendees were held entitled to recover the difference between the contract price and the market value of the merchantable corn on the ground.[20]

If the defendant not only failed to deliver the goods to the plaintiff, but sold and delivered the same goods to another, he cannot complain if for the purpose of estimating damages the price he received on the latter sale is taken as the market value at the time for delivery.[21]

§ 735. Reason generally given for it doubtful.

It has been so often said that the reason for the rule is as just stated—that the plaintiff's loss is measured by the market value of the article, because for this sum he can *replace himself*,—that it is with great hesitation that we venture to make even a suggestion to the contrary; but the sounder explanation of the rule as ordinarily stated appears to be that it represents

[17] Bliss *v.* Buffalo Tin Can Co., 131 Fed. 51.

[18] Valpy *v.* Oakeley, 16 Q. B. 941.

[19] Crist *v.* Armour, 34 Barb. (N. Y.) 378.

[20] Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204.

[21] Moers *v.* Dietz, 52 Misc. 173, 101 N. Y. Supp. 590.

the difference in value between the property right which the buyer actually had and that which he would have had if the seller had performed his contract. The notion of a general practice of replacement is objectionable for a variety of reasons. In the first place, it does not correspond to the facts. A person failing to receive an article bought can be under no absolute duty to society or his vendor to replace himself, nor can it be said that it is so universally done that it is an expected act from one in such a position.[22] But in the second place, if it were, and the doctrine of replacement were supposed to be an invariable rule of law, how are we to explain the rule that the law measures the damages at the very instant of breach? Is it to be supposed that at the very instant of breach every one who has made a contract is in the market ready to replace himself? If not, the rule, if founded on the reason given, ought to be the difference between the contract and the market price within a reasonable time after notice for replacement. But outside of a few jurisdictions which have established such a rule in contracts of a peculiar character,[23] we know of no authority for it.

The doctrine of replacement has undoubtedly a peculiar fitness in one class of sales or agreements for the future delivery of articles—where the defendant has notice of a subcontract which makes it necessary that the plaintiff should replace himself. But we think that the repeated assertion that the reason of the rule of damages in sales is that the purchaser can go into the market and replace himself has a tendency to breed confusion in the whole subject.

§ 735a. Actual value and cost of replacement.

Where the cost of replacement greatly exceeds the actual value it cannot be the basis of damages, even where there is no market value. Upon breach of a contract to deliver full-paid stock it appeared that the stock could not be procured in the market, and the only way by which the buyer could replace

[22] The market value fixes the measure of damages and the law does not require the vendee to go into the market and buy. Saxe *v.* Penokee Lumber Co., 159 N. Y. 370, 54 N. E. 14.

[23] Shreve *v.* Brereton, 51 Pa. 175; and see chapter on Higher Intermediate Value and Replacement.

himself was by subscribing for other shares and paying in $200,000, the full par value. In the New York Supreme Court it was held that this was the measure of the buyer's recovery, but in the Court of Appeals, it appearing that the stock was in fact intrinsically worthless and would have remained so even if the full payment had been made, the court limited the recovery to nominal damages.[24] The court said:

"The claim that because the creation or issue of this worthless stock would cost its par value, the plaintiff is entitled to recover that sum does not seem to have the support of any well-defined principle of law. . . . While the performance of their agreement may have required them to pay to the company two hundred thousand dollars, the entire value of its performance to the plaintiff was in the stock which they undertook to deliver to him, and this was the only benefit he was entitled to take under the contract. The value of the stock, or its pecuniary equivalent, was the measure of his injury by the default."

On the other hand, if the plaintiff was in a position to buy the goods at less than the market price, it has been held that he can recover no more than the difference between the market price and the cost to him of replacement.[25] This decision, however, seems questionable. If the plaintiff can make a good bargain with a third party he, and not the defendant, should be entitled to the benefit of the bargain; furthermore, if the defendant had performed his agreement the plaintiff would have received the profit of that bargain, and might in addition have made the same advantageous bargain with the third party and have realized the profit of that also.

§ 735b. Market value and price at resale.

In Startup *v.* Cortazzi [26] it was intimated that the reason of the rule is that the market value represents what the plaintiff *would have got on a resale*, that is, the true value of his bargain. This does not mean that he buys necessarily for a resale; but that what the article would bring in anyone's hands on a

[24] Barnes *v.* Seligman, 55 Hun, 339, 346; Barnes *v.* Brown, 130 N. Y. 372, 385, 29 N. E. 760.

[25] Harrison Wire Co. *v.* Hall & W. H. Co., 97 Mo. 289.

[26] 2 C. M. & R. 165.

resale, is the value to which he is entitled. Yet in a few cases the view seems to be accepted that the price at which the plaintiff has contracted to resell the goods is the limit of recovery, and that the measure of damages is the difference between that amount and the contract price; so that if the plaintiff had contracted to resell the goods at less than the contract price his recovery would be diminished by the difference.[27] This decision, however, appears to lose sight of the fact that the plaintiff must purchase other goods in the market to perform his contract of resale, and is therefore in fact a loser of the entire market value of the goods; and if the goods had been delivered to him, without being in a worse position as to his contract of resale, he might have sold the goods for the market price. Therefore by the better view damages should be recovered according to the general rule.[28]

In a recent English case the goods were finally delivered after a delay. During the delay the market value of the goods fell. Before the time for delivery the plaintiff resold the goods at a price higher than the market price at the time of actual delivery, but lower than that at the time for delivery fixed by the contract. It was held that the damages were the difference between the market value at the time for delivery and the price of resale.[29] This case seems to be open to a similar criticism to that already made.

§ 735c. Delay in delivery.

When the goods are not delivered on the day fixed by the contract, even though time is of the essence, the buyer is not bound to accept this failure to deliver as a total breach of the contract. If he refrains from doing so and the seller later tenders the goods, which are accepted by the purchaser, the latter is entitled to recover the difference in the market value of the goods at the time when they should have been delivered and when they were delivered.[30] If the article sold was a

[27] Foss *v.* Heineman, 144 Wis. 881, 128 N. W. 881.

[28] Floyd *v.* Mann, 146 Mich. 356, 109 N. W. 679.

[29] Wertheim *v.* Chicoutimi Pulp Co., [1911] A. C. 301.

[30] *California:* Ramish *v.* Kirschbraun, 98 Cal. 676, 33 Pac. 780, 107 Cal. 659, 40 Pac. 1045 (eggs).

Massachusetts: Clement & H. Manuf. Co. *v.* Meserole, 107 Mass. 362 (hoes).

machine intended for use and the injury consisted in the deprivation of such use, the measure of damages is the fair rental value during the delay;[31] though if in fact it appear that the machine would not have been used during the period of delay it has been held that no damages can be recovered for loss of use.[32] Special damages may of course be added in a proper case.[33]

§ 736. Failure to deliver stock.

In case of a refusal to deliver stock which is to be paid for, the measure of damages is governed by the same principles.[34]

Minnesota: Whalon *v.* Aldrich, 8 Minn. 346.

New York: Boomer *v.* Flagler, 51 N. Y. Super. Ct. 211; Davis Provision Co. *v.* Fowler Bros., 47 N. Y. Supp. 206 (meat).

North Carolina: Spiers *v.* Halsted, 74 N. C. 620.

Texas: Tyler Car & Lumber Co. *v.* Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807.

If there is no market at the place of delivery, the value is taken at the nearest mrket. Shepherd, Croan & Co. *v.* Templeman, 136 S. W. 648 (Ky).

[31] *Indiana:* Singer *v.* Farnsworth, 2 Ind. 597.

Maryland: Cent. Trust Co. *v.* Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 29 Atl. 69.

North Carolina: Tompkins Co. *v.* Dallas Cotton Mills, 130 N. C. 347, 41 S. E. 938.

South Carolina: Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155.

See *post*, § 742.

[32] *California:* Hendry *v.* Irvine, 9 Cal. App. 376, 99 Pac. 408.

Washington: Eichbaum *v.* Caldwell Bros. Co., 58 Wash. 163, 108 Pac. 434.

[33] Iowa Mfg. Co. *v.* B. F. Sturtevant Co., 162 Fed. 460, 89 C. C. A. 346.

[34] *Connecticut:* Shelton *v.* French, 33 Conn. 489.

Illinois: Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790.

Indiana: Coffin *v.* State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188.

Maryland: Baltimore City P. R. R. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts: Eastern R. R. *v.* Benedict, 10 Gray, 212; Hussey *v.* Manufacturers' & M. Bank, 10 Pick. 415; Murray *v.* Stanton, 99 Mass. 345; Allen *v.* South Boston R. R., 150 Mass. 200, 22 N. E. 917.

New York: Wintermute *v.* Cooke, 73 N. Y. 107; Van Allen *v.* Illinois C. R. R., 7 Bosw. 515; Chapman *v.* Fowler, 32 App. Div. 250, 116 N. Y. Supp. 962.

North Dakota: Patterson *v.* Plummer, 10 N. Dak. 95, 86 N. W. 111.

South Carolina: Davis *v.* Richardson, 1 Bay, 105.

Tennessee: Memphis, etc., R. R. *v.* Walker, 2 Head, 467; Feder *v.* Gass, 59 S. W. 175.

Virginia: Orange & A. R. R. *v.* Fulvey, 17 Gratt. 366.

Washington: Saunders *v.* U. S. Marble Co., 25 Wash. 475, 485, 65 Pac. 782, 87 Am. St. Rep. 782; Delden *v.* Krom, 34 Wash. 184, 75 Pac. 636.

Wyoming: Kuhn *v.* McKay, 7 Wyo. 42, 65, 49 Pac. 473, 51 Mo. 205.

So where a stockholder has a right to

So in an action for the non-delivery of railway shares on a given day, pursuant to contract, the property not having been paid for, the measure of damages is the difference between the contract price and the market price on the day when the contract was broken.[35] So the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover as damages for the non-delivery the difference between the price agreed on and the market price on the day on which the defendant refused to complete the sale, and that only. He is not entitled to damages in respect to an advance of price taking place afterwards at the time of the actual issue of the scrip. In other words, the time when the defendant refused to comply with his contract is the determining point.[36]

§ 737. Time when market value is to be taken.

The plaintiff recovers the value at the time the contract should have been performed.[37] Where the defendant agreed to deliver wood *as needed* and subsequently repudiated the contract, the plaintiff was allowed to recover the value of the wood at the different times it was needed, and was not confined to the price at the time of the repudiation.[38] * A doubt may arise as to what is the time stipulated for delivery. Where oats were to be delivered "on or about" a certain day, it was held that the plaintiff was not limited to the difference between the contract price and the market value on the precise day named, but might recover the difference between the contract price and the market value within a reasonable time after that day.[39] ** Where delivery was to be on demand, the

subscribe for his proportion of new stock at par, but is deprived of this right by the company, he may recover the difference between par and the market price at the time he had the right to subscribe. Stokes *v.* Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969.

[35] *District of Columbia:* Tayloe *v.* Turner, 2 D. C. (2 Cr. C. C.) 203.

Louisiana: Vance *v.* Tourné, 13 La. 225.

New Hampshire: Rand *v.* White M. R. R., 40 N. H. 79.

Vermont: Jones *v.* Chamberlain, 30 Vt. 196.

England: Shaw *v.* Holland, 15 M. & W. 136.

[36] Tempest *v.* Kilner, 3 C. B. 249.

[37] Taylor *v.* McFatter (Tex. Civ. App.), 109 S. W. 395.

[38] *Illinois:* Long *v.* Conklin, 75 Ill. 32; Delaware & H. C. Co. *v.* Mitchell, 31 N. E. 1026.

New York: Reeve *v.* Gallivan, 89 Hun, 59, 34 N. Y. Supp. 1000.

[39] Kipp *v.* Wiles, 3 Sand. (N. Y.) 585.

market value is to be taken at the time of demand.[40] In a case in Massachusetts, the contract was, that George should deliver to Quarles 1,000 barrels of flour at $6 per barrel, at any time within six months—George to give Quarles six days' notice prior to delivery; Quarles to pay the price aforesaid, and either party to be released, if desiring it, within three months, on paying $500 to the other. This last provision was not taken advantage of. On the 13th of February, Quarles demanded it; it was not delivered; and the question was, on what day the damages were to be computed, it being agreed that such damages were the difference between the price mentioned in the contract and the actual value. The court held that the defendant had to do the first act, *i. e.*, give notice; that he had still six days before the 14th of February to give notice; and as, if he had then given notice, he would have had till the last day to deliver the flour, the actual breach by the non-delivery of the flour must be taken to have occurred on that day, and damages were computed accordingly.[41] If no time is fixed for the delivery, it has been said in Maryland that damages will be calculated from the period at which the defendant refuses to perform.[42] But the general rule is that, if no time is fixed for delivery, the article is deliverable in a reasonable time. What such time is must depend on the circumstances of each case; and the difference between the stipulated price and the price at the time proper for the delivery is the measure of damages.[43] If growing crops are sold, the value is to be calculated at the time when they are mature and ready for delivery.[44] Where the vendor is to ship goods from a distance on a specified day, and there is a breach, it has been held that the proper basis for calculating the damages is the market value on the day when the vendee receives notice of the breach, that

[40] Smith *v.* Berry, 18 Me. 122.

[41] Quarles *v.* George, 23 Pick. (Mass.) 400.

[42] *Maryland:* Williams *v.* Woods, 16 Md. 220; United R. & E. Co. *v.* Wehr, 103 Md. 323, 63 Atl. 475.

And see *Kentucky:* Booth *v.* Booth, 1 A. K. Marsh. 355.

Texas: Palestine C. S. O. Co. *v.* Cotton Oil Co., 61 S. W. 433.

[43] Thompson *v.* Woodruff, 7 Cold. (Tenn.) 401; Paragon Refining Co. *v.* Lee, 98 Tenn. 643, 41 S. W. 362.

[44] *Missouri:* Smock *v.* Smock, 37 Mo. App. 56.

Tennessee: Harris *v.* Rodgers, 6 Heisk. 626.

being the earliest time when he could reasonably be expected to go into the market and replace himself.[45] If the seller is given a certain time within which to deliver, the damages are measured by the market value in the last day for delivery.[46] If the delivery is postponed by an agreement between the parties, the measure of damages is the difference between the contract and market price at the time the article is deliverable by the subsequent agreement.[47] When the time of delivery is postponed without definitely fixing the new time for delivery, the measure of damages would seem to be the difference between the contract price and the market value at a reasonable time after demanding performance.[48] The fact that the vendor gives the vendee notice of repudiation of the contract before the time set for delivery does not obligate the vendee to go at once into the market and repurchase, and the rule of damages is not altered.[49] Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should have been made.[50] So where a contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is brought after the period stipulated for the last

[45] *New York:* Boyd *v.* Quinn Co., 41 N. Y. Supp. 391.

England: Ashmore *v.* Cox, [1899] 1 Q. B. 436.

[46] *Kentucky:* Stahr *v.* Hickman Grain Co., 132 Ky. 496, 116 S. W. 785.

Missouri: Gill *v.* Johnson-Brinkman Com. Co., 84 Mo. App. 456.

[47] *United States:* Roberts *v.* Benjamin, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. ed. 334.

Illinois: Houston *v.* Wendnagel, 135 Ill. App. 95; Pope Metal Co. *v.* Sandoval Zinc Co., 148 Ill. App. 444.

Michigan: McDermid *v.* Redpath, 39 Mich. 372.

Virginia: Smith *v.* Snyder, 77 Va. 432.

England: Ogle *v.* Vane, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272; Tyers *v.* Rosedale & F. I. Co., L. R. 8 Ex. 305, per Martin, B.; L. R. 10 Ex. 195.

In Glenn *v.* Schaffer, 17 W. L. Rep. 273 (Can., 1911), the facts were not regarded as showing an agreement to postpone, and the value was taken at the time originally fixed.

[48] *United States:* Ralli *v.* Rockmore, 111 Fed. 874.

England: Hickman *v.* Haynes, L. R. 10 C. P. 598; Tyers *v.* Rosedale & F. I. Co., L. R. 10 Ex. 195.

[49] *Massachusetts:* P. P. Emory Manuf. Co. *v.* Salomon, 178 Mass. 582, 60 N. E. 377.

Michigan: Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50.

England: Brown *v.* Muller, L. R. 7 Ex. 319.

[50] *United States:* Youghiogheny & O. C. Co. *v.* Verstine, Hibbard & Co., 176 Fed. 972.

Illinois: Sagola L. Co. *v.* Chicago T. & T. Co., 121 Ill. App. 292.

delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively.[51] And where in such a case the contract was repudiated by the defendant, and the action was brought and tried before the expiration of the stipulated number of months, it was held (in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract to reduce their loss), that the true measure of damages was the sum of the differences between the contract price and the market price, at the several periods fixed for delivery; the breach being treated by the court as final.[52]

§ 738. Place where market value is to be taken.

The difference in value is to be taken at the *place* as well as time of delivery, when it can be there ascertained.[53] This is the invariable rule if there is a market price at that place. So, even where the defendant had a monopoly of the coal market at the place where he had agreed to make the delivery, the market price at that place fixed the measure of damages, and it was held by the Supreme Court of the United States error to charge that the measure of damages was the cash value of the

[51] *United States:* Missouri Furnace Co. *v.* Cochrane, 8 Fed. 463; Haff *v.* Pilling, 134 Fed. 294.

Colorado: Cole *v.* Cheovenda, 4 Colo. 17.

New York: Brock *v.* Knower, 37 Hun, 609.

But where it was left optional with the vendee how much to take each month but he was to take the whole by December 31, that date was held to be the time of the breach. Duluth Furnace Co. *v.* Iron Belt Mining Co., 117 Fed. 138, 55 C. C. A. 154.

[52] *Massachusetts:* Barrie *v.* Quimby, 206 Mass. 259, 92 N. E. 451.

England: Ex parte Llansamlet T. P. Co., L. R. 16 Eq. 155; Roper *v.* Johnson, L. R. 8 C. P. 167; Tyers *v.* Rosedale & F. I. Co., L. R. 8 Ex. 305, L. R. 10 Ex. 195.

[53] *Illinois:* Phelps *v.* McGee, 18 Ill. 155.

Iowa: Osgood *v.* Bauder, 75 Ia. 550, 39 N. W. 887, 1 L. R. A. 655.

Kansas: Field *v.* Kinnear, 4 Kan. 476.

Missouri: White *v.* Salisbury, 33 Mo. 150.

Pennsylvania: Schmertz *v.* Dwyer, 53 Pa. 335.

Texas: Specialty Furniture Co. *v.* Kingsbury, 60 S. W. 1030.

Vermont: Worthen *v.* Wilmot, 30 Vt. 555.

West Virginia: Boyd *v.* Gunnison, 14 W. Va. 1.

In the case of San Francisco securities the value taken was that at the San Francisco Stock Exchange, not a (fictitious) New York quotation, though New York was the place of delivery. Zimmermann *v.* Timmermann, 193 N. Y. 486, 86 N. E. 540.

kind of coal mentioned at other towns near the place of delivery, "after deducting the contract price of the coal and the cost and expenses of transporting thither." Bradley, J., said, that although the plaintiff would probably have received those prices, the rule was firmly established that the value at the place of delivery fixed the measure of damages.[54] So in New York, where assumpsit was brought for breach of a contract to deliver 100,000 shingles at a landing-place called Bailey Town, on Seneca Lake, on the 1st of June, 1828, for which the plaintiff was to pay $125, or $1.25 per thousand, the plaintiff proved the value of the shingles at the place of delivery on the day (1st of June) to have been $1.87 or $2.00 per thousand. The defendant was allowed to prove the value of shingles at Geneva *and other places*, and from an *average of prices* to find the value; but, the plaintiff moving for a new trial, this was held wrong, and that the true rule of damages was the difference between the price as fixed by the parties on the day and *at the place* of delivery and the market value at the same time and place; and a new trial was ordered.[55] Where cheese sold to the plaintiff had been warranted to be worth nineteen cents a pound in the New York market, and was proved to be worth there only twelve, proof that it was shipped to London and netted to the plaintiff, over all expenses, by sales made in the ordinary course of business, sixteen and a half cents a pound, was held inadmissible to reduce the damages.[56] For a breach of a contract by the vendor to deliver goods to a carrier at A, to be shipped to the vendee at B, a few cases hold the measure of damages to be the difference between the contract price and the market value at B, at the time the goods should have arrived, deducting the cost of transportation,[57] on the ground

[54] Grand Tower Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

[55] Gregory *v.* McDowel, 8 Wend. 435. In a case in Arkansas, in an action on an agreement by which Hanna sold Harter ten hogs, where the defendant below refused to deliver, it was held that the measure of damages was the difference between the price agreed on between the parties and the market price of the pork at the time of the delivery at the place fixed on by the agreement. Hanna *v.* Harter, 2 Ark. 397.

[56] Durst *v.* Burton, 47 N. Y. 167, 7 Am. Rep. 428.

[57] *Alabama:* Buist *v.* Guice, 96 Ala. 255, 11 So. 280; Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

Nebraska: McCormick Harvesting Co. *v.* Jensen, 29 Neb. 102, 45 N. W. 160.

that the contract contemplates a beneficial delivery to the vendee and therefore he is entitled to full compensation for the failure to receive it; but by the better view the ordinary rule is followed, and the market price at the place of delivery to the carrier, if there is there a market value, is taken.[58]

§ 739. Nearest market.

On the principles stated in an earlier chapter,[59] if there is no market value at the place of delivery, the true value of the goods at the time fixed for delivery is to be shown by the best evidence possible. If there is a neighboring market, the price at such market is competent evidence after making due allowance for the cost of transportation between points. Whether such cost should be added to or subtracted from the price in the nearest market depends on circumstances. If the goods were bought to be used at the place of delivery the buyer can be compensated only by adding such cost to the price. This would represent the cost of replacement. On the other hand, if the goods are intended for resale full compensation is awarded if the cost of transportation to the neighboring market be subtracted from the price there. The measure of damages, however, should not depend on the undisclosed purposes of the vendee, and, at least in the absence of knowledge by the vendor of such purposes, there should be but one rule applicable to both cases. The correct rule seems to be this: if the place of delivery is one where the consumption normally exceeds the production the cost of transportation thither should be added to the price in the nearest market; otherwise if the production normally exceeds the consumption.[60]

New York: Boyd *v.* L. H. Quinn Co., 17 Misc. 278, 40 N. Y. Supp. 370.

[58] *Iowa:* Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Ia. 382, 113 N. W. 827.

[59] Chap. v.

[60] In the following cases the cost of transportation was added to the price in the nearest market.

United States: Grand Tower Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71, (coal intended for use, as the vendor knew).

Colorado: Sellar *v.* Clelland, 2 Colo. 532.

Connecticut: Righter *v.* Clark (Conn.), 60 Atl. 741 (coal sold at wholesale prices; there was no wholesale market at the place for delivery).

Illinois: Capen *v.* De Steiger G. Co., 105 Ill. 185 (fruit jars).

Indiana: Vickery *v.* McCormack, 117 Ind. 594, 20 N. E. 495 (lumber to be used for building).

Maine: Furlong *v.* Polleys, 30 Me.

If the goods were purchased for resale at another place, and there is no market at which others can be procured to send to that place, the difference between the market price at the place of resale and the contract price, plus the cost of transportation, may be recovered.[61] It would seem that if the place of resale is not the nearest market, knowledge of the destination of the goods on the part of the seller should be proved,[62] as otherwise the loss of the price at the place of resale would not be a natural consequence. Such knowledge is often shown by the fact that the goods were to be delivered to a carrier, to be forwarded to that place.[63]

§ 740. Price receivable on a sub-contract.

The rule in Hadley *v.* Baxendale, as generally understood, requires a notice of special damages to be given, or circumstances amounting to such notice to be within the contemplation of the parties, in order to enable a plaintiff to recover

491, 50 Am. Dec. 635 (hay intended for use in a lumber camp).

New Hampshire: Stevens *v.* Lyford, 7 N. H. 360 (lumber).

Virginia: Nottingham Ice Co. *v.* Preas, 102 Va. 820, 47 S. E. 823 (ice).

Cf. Yellow Poplar Lumber Co. *v.* Chapman, 20 C. C. A. 503, 74 Fed. 444.

In these cases the cost was deducted:

California: Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406 (logs).

Indiana: Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712 (lumber purchased for resale).

Maine: Berry *v.* Dwinel, 44 Me. 255 (logs).

Missouri: Vanstone *v.* Hopkins, 49 Mo. App. 386 (wheat); Cobb *v.* Whitsett, 51 Mo. App. 146 (corn); National W. & S. Co. *v.* Toomy, 144 Mo. App. 516, 129 S. W. 423 (hay).

New York: Wemple *v.* Stewart, 22 Barb. 154 (lumber); Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 (cheese).

Canada: Hendrie *v.* Neelon, 12 Ont. App. 41, 3 Ont. 603 (lumber).

In McCleskey & Whitman *v.* Howell Cotton Co., 147 Ala. 573, 42 So. 67, no allowance for transportation was suggested.

In Houston I. & B. Co. *v.* Tiemer (Tex. Civ. App.), 139 S. W. 992, where the goods were bought for export, and freight to the export point was cheaper from the nearest market than from the point of delivery, the cost of transportation was not added.

See § 246.

[61] *Alabama:* Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

Iowa: Louis Cook Mfg. Co. *v.* Randall, 62 Ia. 244.

Kentucky: Campbellsville Lumber Co. *v.* Bradley, 96 Ky. 494, 29 S. W. 313.

Nebraska: McCormick H. Co. *v.* Jensen, 29 Neb. 102, 45 N. W. 160.

Oregon: Hocker-Smith *v.* Hanley, 29 Ore. 27, 44 Pac. 497.

Tennessee: McDonald *v.* Unaka T. Co., 88 Tenn. 38.

Wisconsin: Cockburn *v.* Ashland Lumber Co., 54 Wis. 619.

[62] Cockburn *v.* Ashland Lumber Co., 54 Wis. 619.

[63] McCormick H. Co. *v.* Jensen, 29 Neb. 102, 45 N. W. 160.

any other damages than the difference between the contract and the market price. Where a vendee, therefore, has, between the time of making the original contract and that limited for its performance, made a sub-contract for the resale of the goods at a higher price than the market rate at the time fixed for delivery under the original contract, he cannot recover for his loss of the profits he would have made by carrying out the resale.[64] It has, however, been held that if there is no market price, the plaintiff can recover what he was to obtain on a sub-contract, if a usual one, less the contract price.[65] The rule has been put on the ground that the sub-contract shows the value. Where the defendant had notice of a sub-contract or any special damages which a plaintiff would suffer, such damages are undoubtedly recoverable.[66] The notice must

[64] *Alabama:* Ala. Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

Georgia: Orr *v.* Farmers' Alliance Warehouse & Com. Co., 97 Ga. 241, 22 S. E. 937; Huggins *v.* South Eastern L. & C. Co., 121 Ga. 311, 48 S. E. 933.

Texas: Anderson Electric Co. *v.* Cleburne Water Co., 27 S. W. 504.

England: Williams *v.* Reynolds, 6 B. & S. 495.

[65] *California:* McKay *v.* Riley, 65 Cal. 623.

Illinois: Van Arsdale *v.* Rundel, 82 Ill. 63; Loescher *v.* Deisterberg, 26 Ill. App. 520.

Pennsylvania: McHose *v.* Fulmer, 73 Pa. 365.

Virginia: Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723.

England: Borries *v.* Hutchinson, 18 C. B. (N. S.) 445.

This rule was applied in Carroll-Porter B. & T. Co. *v.* Columbus Machine Co., 55 Fed. 451, 5 C. C. A. 190, in which, however, the damages were claimed for a breach of warranty. See *post*, §§ 759 *et seq.*

[66] *United States:* Wilmoth *v.* Hamilton, 127 Fed. 48.

Florida: Robinson *v.* Ayer, 35 Fla. 544, 17 So. 745.

Georgia: Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 835.

Illinois: Benton *v.* Fay, 64 Ill. 417; Carpenter *v.* First Nat. Bank, 119 Ill. 352, 10 N. E. 18; Lapp *v.* Illinois Watch Co., 104 Ill. App. 255.

Kansas: Stewart *v.* Powers, 12 Kan. 596.

Louisiana: Gauthin *v.* Green, 14 La. Ann. 788.

New York: Messmore *v.* New York S. & L. Co., 40 N. Y. 422; Heinemann *v.* Heard, 50 N. Y. 27; Laird *v.* Townsend, 5 Hun, 107; Baxter *v.* Gilson Collins Co., 57 N. Y. Supp. 815.

Virginia: Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723; Perry T. & L. Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

Wisconsin: Hammer *v.* Schoenfelder, 47 Wis. 455.

England: Smeed *v.* Foord, 1 E. & E. 602; Elbinger Actien-Gesellschaft *v.* Armstrong, L. R. 9 Q. B. 473; Borries *v.* Hutchinson, 18 C. B. (N. S.) 445; Grebert-Borgnis *v.* Nugent, 15 Q. B. Div. 85.

Canada: Watrous *v.* Bates, 5 Up. Can. C. P. 366.

be given at the time of entering into the contract.[67] There need be no notice of *the terms* of a sub-contract, unless the terms are exceptional.[68] But there must be a notice of exceptional terms.[69] If there is no notice the plaintiff can still recover an amount not to exceed what would usually result from the breach of contract.[70]

§ 741. Avoidable loss.

In accordance with the principle that the plaintiff should do the best he can to reduce the damages, he will not be allowed to recover damages which could have been avoided by the acceptance of a tender made by the defendant subsequently to the proper time of performance.[71] So if it be readily in the power of the vendee to procure the article elsewhere, he should do so, and his damages in such case are limited to compensation for the delay and expense thereby sustained.[72] It has been held that if he acquires the article for less than the prevailing market value, the damages are the difference between the price paid and the contract price.[73] The vendee is under no duty to go into the market and replace himself before the day for delivery even though the vendor has given notice of his repudiation, and if he does repurchase on the market, he does so at his own risk that the market price on the day for delivery will be less than the price he paid.[74] Nor can

[67] Gee *v.* Lancashire & Y. Ry., 6 H. & N. 211; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. Div. 670.

[68] *New York:* Booth *v.* Spuyten Duyvil R. M. Co., 60 N. Y. 487, 19 Am. Rep. 204.

Wisconsin: Guetzkow *v.* Andrews, 92 Wis. 214, 66 N. W. 119, 53 Am. St. Rep. 909.

[69] Horne *v.* Midland Ry., L. R. 7 C. P. 583, L. R. 8 C. P. 131.

[70] Cory *v.* Thames I. W. & S. B. Co., L. R. 3 Q. B. 181.

[71] *Missouri:* Barnett *v.* Elwood Grain Co. (Mo. App.), 133 S. W. 856.

New York: Parsons *v.* Sutton, 66 N. Y. 92.

[72] *Alabama:* Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

Arkansas: Bench *v.* Potts, 57 Ark. 257.

Kentucky: Barker *v.* Mann, 5 Bush, 672, 96 Am. Dec. 373.

Missouri: Shose *v.* Neiswaanger, 18 Mo. App. 236, 244.

New York: Taylor *v.* Read, 4 Paige, 561; Aronson *v.* H. B. Claflin Co., 115 N. Y. Supp. 97; Joseph *v.* Sulzberger, 136 App. Div. 499, 121 N. Y. Supp. 73; Diamond M. P. Co. *v.* Independent P. P. Co., 121 N. Y. Supp. 1108.

[73] Theiss *v.* Weiss, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

[74] *United States:* Missouri Furnace Co. *v.* Cochrane, 8 Fed. 463.

Kansas: York-Draper Co. *v.* Lusk (Kan.), 49 Pac. 788.

the vendee recover for any damages which are the result of his own carelessness. So where, on the defendant's failure, he purchased an inferior article and had it manufactured so as to perform a sub-contract he had entered into, he was not allowed to recover the expenses of sending the manufactured article to his vendee, who refused them, for he was not warranted in such a proceeding.[75] It has been held that the defendant cannot reduce the damages by an offer to sell to the plaintiffs at a price below the market value on the day of delivery;[76] but on this point the authorities are in conflict.[77] In a Federal case where the defendant had agreed to sell lumber to the plaintiff on credit but on the day for delivery refused to extend credit and offered the goods for cash at a reduced price, which offer was refused, the buyer being unable to obtain the goods elsewhere, the court held that the buyer could not recover special damages because he should have accepted the seller's offer and thus minimized his loss.[78] And where the goods could not be procured in the market, but the defendant, though he did not deliver the goods sold, offered similar goods which would have answered as a substitute, the plaintiff should have accepted the offer and avoided further loss.[79]

§ 742. Consequential loss.

Allowances for consequential loss in addition to, or differing from the usual measure of damages, will be made or refused in accordance with the rule in Hadley *v.* Baxendale, the rule of avoidable consequences, and the other general principles affecting contracts.[80] Where it is known to the seller that the goods

Massachusetts: Emory Mfg. Co. *v.* Salomon, 178 Mass. 582, 60 N. E. 377.

Michigan: Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50.

Pennsylvania: Morris *v.* Supplee, 208 Pa. 253, 57 Atl. 566.

And see *Illinois:* Follansbee *v.* Adams, 86 Ill. 13.

Nebraska: Carter *v.* Roberts, 85 Neb. 480, 124 N. W. 94.

[75] McHose *v.* Fulmer, 73 Pa. 365.

[76] *United States:* Campfield *v.* Sauer, 189 Fed. 576.

New York: Havemeyer *v.* Cunningham, 35 Barb. 515.

[77] *Ante*, § 222.

[78] Lawrence *v.* Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167. *Cf.* American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117.

[79] Lande *v.* A. G. Hyde & Sons, 66 Misc. 259, 121 N. Y. Supp. 258.

[80] *Colorado:* Richner *v.* Plateau L. S. Co., 44 Colo. 302, 98 Pac. 178 (sale of hay to feed cattle; plaintiff recovers expense of securing other hay and of

were ordered by the buyer for a particular occasion, and were to be delivered in time for that occasion, and the contract is broken by the seller, and no time remains to the buyer after the breach to purchase similar goods elsewhere, the seller may be held for such damage as directly and naturally arises from the breach, although "beyond, to this extent, the difference between the contract and the market price." [81] In Benton *v.* Fay,[82] a purchaser who gave notice of the object of his purchase was allowed to recover, for failure to send him a planing machine, a fair rent for the use of his buildings and other machinery, they being otherwise in running order, during the time they lay idle in consequence of the defendant's refusal to deliver the machine, but only for so long a time as was reasonably necessary to supply himself with another machine of similar character, after being advised of the defendant's refusal to send the machine sold to him. The profits that might have been made were held not recoverable where the vendor knew that a mill sold was to be used in grinding corn for cattle; the measure of damages was the difference between the cost of corn meal as ground in the contemplated mill and the price which the vendee necessarily paid for a reasonable substitute for the meal.[83] Where the defendant contracted to supply

removing cattle to another place to feed, and shrinkage of cattle).

Kentucky: Enterprise Mfg. Co. *v.* Campbell, —— Ky. L. Rep. ——, 121 S. W. 1040 (sale of sawmill and fixtures; plaintiff recovers expense of looking up the mill, and value of use while delayed, but not for loss of use of the lumber intended to be sawed, nor, in absence of notice, loss of particular profits from sawing).

New York: Nicholls *v.* American S. & W. Co., 117 App. Div. 21, 102 N. Y. Supp. 227 (sale of material for manufacture; plaintiff recovers loss of rent of factory and return on capital invested).

South Carolina: Gadsden *v.* Howe F. & C. Co., 72 S. E. 15 (failure to deliver fertilizer; in absence of notice plaintiff cannot recover for delay in planting).

Texas: Kirby Lumber Co. *v.* C. R. Cummings & Co. (Tex. Civ. App.), 122 S. W. 273 (purchase for resale in foreign market; plaintiff recovers ordinary profits of resale in such market).

[81] *Kansas:* Halsted Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

Massachusetts: Abbott *v.* Hapgood, 150 Mass. 248, 22 N. E. 907, 15 Am. St. Rep. 193.

West Virginia: Davis *v.* Grand Rapids Furn. Co., 41 W. Va. 717, 24 S. E. 630.

Wisconsin: Richardson *v.* Chynoweth, 26 Wis. 656.

[82] 64 Ill. 417. *Cf.* Pallett *v.* Murphy, 131 Cal. 192, 63 Pac. 366, 82 Am. St. Rep. 341 (water for irrigation; rental value of land awarded); Berkey & G. Furniture Co. *v.* Hascall, 123 Ind. 502, 24 N. E. 336, 9 L. R. A. 65 (furniture for hotel).

[83] Chalice *v.* Witte, 81 Mo. App. 84.

ornamental bricks for the front of a building and failed to do so, and no other bricks of the sort could be procured, damages were allowed for the lessened value of the building from the front being built with inferior bricks.[84] A water company agreed to furnish water sufficient to extinguish fires. The measure of damages for a breach was the value of the property destroyed by fire, this loss being clearly in the contemplation of the parties.[85] Where the vendor broke its contract to deliver iron ore and the vendee was unable to procure ore of the same quality in the market, the vendee recovered the increased expense of using ore of an inferior grade, it appearing that the defendant was cognizant of all the facts.[86] Under a contract by the defendant to sell and deliver a large quantity of coal at a fixed price during a certain time, to be transported at the plaintiff's expense to their factory, it was held in an action to recover for a breach of the contract by delivering inferior coal, and in not delivering it till after the contract time, that the measure of damages for the inferior quality was the difference between the value at the factory of the coal called for by the contract, and that of the coal delivered; and the measure of damages for the failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance, and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period.[87] Where the plaintiff upon a breach by the defendant of a contract of sale was unable to procure a substitute to fill a sub-contract of which the defendant had notice and the sub-vendee recovered damages for the breach, the plaintiff in this action was allowed to recover the amount of damages awarded the sub-vendee.[88] Expenses rea-

Cf. Carroll-Porter B. & T. Co. *v.* Columbus Mach. Co., 55 Fed. 451, 5 C. C. A. 190.

[84] Sweeney *v.* Jamieson, 2 Wash. 254.

[85] Harris *v.* Columbia & L. Co., 114 Tenn. 328, 85 S. W. 897.

[86] Thomas Iron Co. *v.* Jackson Iron Co., 131 Mich. 130, 91 N. W. 137.

[87] Merrimack Manuf. Co. *v.* Quintard, 107 Mass. 127, 9 Am. Rep. 13.

[88] *United States:* Iowa Mfg. Co. *v.* Sturtevant Mfg. Co., 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575.

New York: Czarnikow, MacDougall & Co. *v.* Baxter, 130 N. Y. Supp. 617.

England: Grebert-Borgnis *v.* Nugent, 15 Q. B. Div. 85.

And see *Iowa:* Black *v.* De Camp, 78 Ia. 718.

sonably incurred in preparation to receive the articles sold are recoverable.[89] If the plaintiff has incurred reasonable expenses, so as to prevent injurious consequences, he can recover them.[90] The expenses of delay, caused by reliance on the defendant's intention to perform, were held recoverable in Grand Tower Co. *v.* Phillips.[91]

In case the breach by the vendor is only by a delay in delivery, consequential damages are awarded in accordance with the principles applicable in case of non-delivery. Unavoidable loss of time of the vendee's workmen [92] and injuries to property [93] which are in the contemplation of the parties are elements of damages. So too expenses incurred in preparation to receive [94] are recoverable, as are also demurrage charges on a vessel detained until the goods arrive.[95] And where the delay results in loss of use of property, the value of such use, usually the rental value, is recoverable.[96]

[89] *California:* Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

Colorado: Farrer *v.* Caster, 17 Colo. App. 41, 67 Pac. 171.

Iowa: Mann *v.* Taylor, 78 Ia. 355, 43 N. W. 220.

Michigan: Cuddy *v.* Major, 12 Mich. 368 (demurrage charges).

Missouri: Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644, 84 Am. St. Rep. 869.

Virginia: Perry *v.* Reynolds, 100 Va. 264, 40 S. E. 919 (demurrage charges).

Cf. Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421 (expenses of a resale recovered).

[90] Borries *v.* Hutchinson, 18 C. B. (N. S.) 445; Lalor *v.* Burrows, 18 Up. Can. C. P. 321. But incidental expenses cannot be considered in the absence of special circumstances known to the seller. Moffit-West Drug Co. *v.* Byrd, 34 C. C. A. 351, 92 Fed. 290.

[91] 23 Wall. 471, 23 L. ed. 71.

[92] *Kentucky:* Clark *v.* Bailey, 22 Ky. L. Rep. 1668, 61 S. W. 30.

New York: Raymore Realty Co. *v.* Pfotenhauer-Nesbit Co., 129 N. Y. Supp. 1002.

Washington: Interstate Engineering Co. *v.* Archer, 117 Pac. 470.

[93] *Massachusetts:* Lonergan *v.* Waldo, 179 Mass. 135, 60 N. E. 479, 88 Am. St. Rep. 365.

North Carolina: Neal *v.* Pender-Hyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

Washington: Interstate Engineering Co. *v.* Archer, 117 Pac. 470.

[94] Chatham *v.* Jones, 69 Tex. 744, 7 S. W. 600.

[95] *New York:* Miner *v.* Blume, 64 App. Div. 511, 72 N. Y. Supp. 320.

England: Agius *v.* Great Western Colliery Co., [1899] 1 Q. B. 413.

[96] *United States:* Dustin Co. *v.* St. Petersburg Ins. Co., 126 Fed. 816 (machinery).

Iowa: Brownell *v.* Chapman, 84 Ia. 504, 51 N. W. 249, 35 Am. St. Rep. 326 (machinery).

New York: Jones *v.* National Printing Co., 13 Daly, 192 (materials).

Texas: Dilley *v.* Ratcliss, 69 S. W. 237 (machinery).

But in an action for delay in furnish-

§ 742a. Profits.

It follows from what has already been said that in general in this class of cases lost profits cannot be recovered. To make a recovery of them possible it must appear that they were within the contemplation of the parties, and that they were not too conjectural.[97] The ordinary case is that of failure to supply goods bought for resale [98] or failure to supply machinery [99] or materials to be used by the purchaser in building or manufacturing.[100] So where the defendant failed to deliver bottles for essences manufactured by the plaintiff, the plaintiff's loss in business through inability to bottle his essences is recoverable.[101] Where the defendant agreed to supply logs for the plaintiff's mill, the net profits to be divided be-

ing machinery for a mill the rental value of the entire mill cannot be recovered without evidence of special circumstances. Munson *v.* James Smith W. M. Co., 118 App. Div. 398, 103 N. Y. Supp. 502.

See *ante*, § 195.

[97] *Alabama:* Young *v.* Cureton, 87 Ala. 727, 6 So. 352.

Kentucky: Hay *v.* Williams, 8 Ky. L. Rep. 434.

New York: Vuccino & Co. *v.* Brown, 92 N. Y. Supp. 319.

[98] *United States:* Howard Supply Co. *v.* Wells, 176 Fed. 513, 100 C. C. A. 70.

Kentucky: Roberts, Wicks & Co. *v.* Lee, 102 S. W. 300, 31 Ky. L. Rep. 266.

Michigan: Duvall *v.* Ferwerda, 146 Mich. 13, 108 N. W. 1115.

Rhode Island: Eddy *v.* Fay Fruit Co. (R. I.), 67 Atl. 586.

Texas: Weatherford M. & F. Co. *v.* Tate, 49 Tex. Civ. App. 392, 109 S. W. 406.

[99] *United States:* Howard *v.* Stillwell B. Mfg. Co., 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. 500.

Kentucky: Bates Mach. Co. *v.* Norton Iron Works, 113 Ky. 372, 68 S. W. 423.

Massachusetts: Abbott *v.* Hapgood, 150 Mass. 248, 25 N. E. 311, 5 L. R. A. 586, 15 Am. St. Rep. 193.

Michigan: Industrial Works *v.* Mitchell, 114 Mich. 29, 72 N. W. 25.

North Carolina: Bender Lumber Co. *v.* Wilmington Iron Works, 130 N. C. 584, 41 S. E. 797.

Texas: Alamo Mills Co. *v.* Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097; Fred W. Wolf Co. *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648; Reagan R. B. Co. *v.* Dickson C. W. Co., 121 S. W. 526.

[100] *California:* Friend & T. Lumber Co. *v.* Miller, 67 Cal. 464, 8 Pac. 40.

Kentucky: Guenther *v.* Taylor, 23 Ky. L. Rep. 536, 63 S. W. 439.

Maryland: Equitable G. L. Co. *v.* Baltimore, C. T. & M. Co., 65 Md. 73.

Michigan: Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Thorn *v.* Morgan, 135 Mich. 51, 97 N. W. 43.

Pennsylvania: Imperial C. & C. Co. *v.* Port Royal C. & C. Co. (Pa.), 20 Atl. 937.

Tennessee: Chisholm & M. Mfg. Co. *v.* U. S. Canopy Co., 111 Tenn. 202, 77 S. W. 1062.

[101] Culin *v.* Woodbury Glass Works, 108 Pa. 220.

tween them, the plaintiff upon breach is entitled to recover the profits he would have realized.[102]

If, however, the goods which the defendant contracted to deliver can be procured in the market the plaintiff must get them elsewhere, and cannot charge the defendant with loss of profits from their use or resale.[103]

§ 743. Waiver.

Where a vendor has partly failed to comply with his part of the contract, yet if the vendee have received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used within the limit of the contract price, provided its value exceed the damage he has sustained from the failure to complete the contract.[104] But the right to delivery of the full amount is not necessarily waived by accepting a partial delivery.[105] Neither is the right to damages for delay in delivery waived by acceptance of the goods at a later date.[106]

§ 744. Payment in advance.

* But a different case is presented where the purchaser has paid the price in advance, or has otherwise, as by the transfer of stock, been deprived of the use of his property; and here it has been insisted that the purchaser is not to be limited to the value of the article at the time of delivery, but shall have the advantage of any rise in the market value of the article which may have taken place up to the time of the trial; and on this point different and conflicting decisions have been made.**

[102] Robinson *v.* Bullock, 66 Ala. 548; see § 193.

For other instances where profits were recoverable see the following:

Kansas: Brown *v.* Hadley, 43 Kan. 267, 23 Pac. 492.

Kentucky: New Market Co. *v.* Embry, 20 Ky. L. Rep. 1130, 48 S. W. 980.

Australia: Australian Smelting Co. *v.* British Broken Hill Proprietary Co., 22 Vict. L. R. 190.

[103] Atlas P. C. Co. *v.* Hopper, 116 App. Div. 445, 101 N. Y. Supp. 948; Stecker *v.* Weaver C. & C. Co., 116 App. Div. 772, 102 N. Y. Supp. 89; McManus *v.* American Woolen Co., 126 App. Div. 68, 110 N. Y. Supp. 680.

[104] Koeltz *v.* Bleckman, 46 Mo. 320.

[105] Creighton *v.* Comstock, 27 Oh. St. 548.

[106] Digman *v.* Spurr, 3 Wash. 309, 28 Pac. 529.

The ground of the latter rule has not been clearly defined. The courts seem to have been influenced by the fact that, whereas, in the ordinary case of breach by the vendor, the vendee may take the money he was to have given the vendor, and go into the market and replace himself; when the vendor has received the price, the vendee may be unable to purchase other goods, and hence, having been deprived of the use of his property, he is entitled to the best price he could have obtained for the article purchased up to the time of the settlement of the question. The general question of the allowance of a higher intermediate value has already been discussed.[107] It is only necessary here to examine the application of that rule in this particular case.

The application of this principle in the case now under consideration was first made in some early English and New York cases.[108] A case in New York frequently cited upon this point,[109] was an action of assumpsit on a note, promising, for value received, to pay one hundred and fifty dollars in good salt, at one dollar and a half per barrel, to be delivered on the 15th of April then next. This the court held to be a contract to deliver salt, and decided that, as the goods had been paid for, the measure of damages was the difference between the contract price and the highest value at any time between the period for delivery and the day of trial.

* In Connecticut, it has been held that where the price is paid in advance, the advance at all events can be recovered without any investigation into the state of the market. In a case in that State, suit was brought on an agreement to deliver flour. The plaintiff paid part of the price in advance. At the time fixed for the performance, flour had fallen in price, and it was held that he was entitled to recover his advance with interest. It was admitted that where one contracts to deliver any article other than money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, with interest for the delay, because it is supposed that the party will have supplied himself else-

[107] See chap. xxii.

[108] Shepherd *v.* Johnson, 2 East, 211; Gainsford *v.* Carroll, 2 B. & C. 624; Cortelyou *v.* Lansing, 2 Caines Cas. 200; West *v.* Wentworth, 3 Cow. 82.

[109] Clark *v.* Pinney, 7 Cow. 681, 695.

where with the article at that price; but it was held that this reasoning did not apply to a case where the defendant had violated his contract and retained the plaintiff's money without consideration.[110] In a case in the same State, on an agreement by the defendant to give a deed of certain land in consideration of the transfer to him of a farm worth $2,000, the defendant insisted that the plaintiff could only recover the value of the farm conveyed by him; and it was so held at the trial. But the rule that the value of the article at the time and place of delivery, and interest for delay, furnished the measure of damages, was again declared by the court. It was said "that the *consideration of a contract* is never the rule of estimating the damages for the breach of an express agreement;" and a new trial was granted.[111] ** The whole subject was, however, afterwards reviewed in that State, and the rule of allowing the *value of the goods at the time of trial* adopted,[112] the court saying "that it was founded upon principles of natural justice."

§ 745. The rule of higher intermediate value followed in some jurisdictions.

In England, in the Nisi Prius case of Elliot *v.* Hughes,[113] the rule is approved by which the measure of damages for the non-delivery of goods paid for in advance is the difference between the price paid and the highest price up to the trial; but the case of Startup *v.* Cortazzi [114] seems opposed to this,

[110] Bush *v.* Canfield, 2 Conn. 485. See an able dissenting opinion by Hosmer, J. This case presents, in fact, the question whether the loss by the depreciation of the article should fall on the vendor or purchaser; the court, in awarding to the plaintiff his advance and interest, really extricated him from a losing bargain.

[111] Wells *v.* Abernethy, 5 Conn. 222, 227. "The reason of the rule," said Hosmer, C. J., "is so simple and obvious, that it has been universally embraced, except in cases of stock contracts; and the anomaly in such cases has arisen from the specific relief which chancery has been in the habit of giving, and which courts of law, not universally, but in most instances, have in substance thought proper to pursue. Whenever a case on this subject occurs, I shall be desirous of putting an end to this exception without cause, by the establishment of perfect uniformity, as no just reason can be assigned for any discrimination."

[112] West *v.* Pritchard, 19 Conn. 212.

[113] 3 F. & F. 387.

[114] 2 C. M. & R. 165.

and the law of England is said to be unsettled, except in the case of sales of stock, where the value at the time of trial is allowed.[115]

The modification of the general rule in case of payment in advance is sanctioned in Indiana in regard to commercial transactions. In the case of Kent *v.* Ginter,[116] the court, after stating that the ordinary rule for measuring damages in suits by the vendee against the vendor is the value of the property at the time and place of delivery, declares that one exception is well established in the case of stocks, and approves also those authorities which make a second exception in the case of the payment in advance for an article which is one of a class or quantity. In this case the vendee has two remedies: one to treat the contract as rescinded, and sue to recover the money paid, with interest; the other, to sue for damages which include, besides the value of the article at the time of the purchase, the benefit of its rise; whether this second exception extends to the case of a specific article, the title to which passed by the purchase, so that trover or replevin could be maintained for it, by the vendee, the court leaves undecided. In Pennsylvania it is held that where bank stock has been wrongfully withheld from a party entitled to it, the measure of damages, if the consideration for the stock has been paid, is "the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime;" but if the consideration "has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock." [117] Such also is the rule in California,[118] where in one case the court sustained an alternative instruction to the jury that they might find the amount of the purchase money and interest, or the highest market price of the property to the time of trial,[119]

[115] Mayne on Damages, 4th ed., p. 179; Harrison *v.* Harrison, 1 C. & P. 412.

[116] 23 Ind. 1.

[117] Bank of Montgomery *v.* Reese, 26 Pa. 143; *acc.*, Musgrave *v.* Beckendorff, 53 Pa. 310; Kountz *v.* Kirkpatrick, 72 Pa. 376, 13 Am. Rep. 687.

[118] Dabovich *v.* Emeric, 12 Cal. 171, 73 Am. Dec. 529.

[119] Maher *v.* Riley, 17 Cal. 415.

and in Oregon.[120] In Texas, also, upon much consideration, the rule has been declared that, on breach of a contract to deliver chattels, where the purchase money has been paid, the highest price at any time between the time appointed for delivery and the day of trial, and interest from the time appointed for delivery, is the true measure of damages.[121]

In the Supreme Court of the United States Chief-Justice Marshall intimated that this was the correct rule;[122] but he spoke only for himself. The rule of higher intermediate value, as now modified in New York, has been recently adopted by that court in the case of breach of a broker's contract to carry stocks on a margin;[123] but it is doubtful whether the rule would be extended by that court to the case of non-delivery of goods sold.

In Iowa the plaintiff has been allowed to recover the price of the goods when they were demanded, that being the highest price previous to the trial. When delivery should have been made, the price was much lower. The court in that case stated the Iowa rule to be that the plaintiff could recover the highest price previous to the day of bringing suit, where not unnecessarily delayed.[124]

Where at the time of making a contract for the purchase of personal property *in futuro* a small sum was paid as earnest money, but was returned before the vendor's breach of the contract, or any tender of the rest of the purchase money, this was held in Vermont not such a payment in advance as to come within the rule.[125] In England, actions for the non-delivery of railway shares pursuant to a contract of sale are distinguished from actions for not replacing borrowed stock,

[120] Livesley *v.* Krebs Hop Co. (Ore.), 107 Pac. 460.

[121] Brasher *v.* Davidson, 31 Tex. 190, 98 Am. Dec. 525; Gregg *v.* Fitzhugh, 36 Tex. 127. So where payment is to be made in goods at a stipulated price. Ranger *v.* Hearne, 37 Tex. 30.

In a later case, on the question of interest the court held that that should be awarded not from the date of breach but from the date on which the highest intermediate value was determined. Masterton *v.* Goodlett, 46 Tex. 402; Randon *v.* Barton, 4 Tex. 289; Calvit *v.* M'Fadden, 13 Tex. 324.

[122] Shepherd *v.* Hampton, 3 Wheat. 200, 4 L. ed. 369.

[123] Galigher *v.* Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. 335.

[124] Stapleton *v.* King, 40 Ia. 278.

[125] Worthen *v.* Wilmot, 30 Vt. 555.

and in the former class of cases the market price on the day when the contract of sale is to be formed, instead of that on the day of trial, is fixed as the standard for the computation of the damages.[126]

§ 746. The rule disapproved in other jurisdictions.

But, as has been seen, the rule of higher intermediate value has been disapproved in many jurisdictions; and in them the measure of damages is held to be the same, whether the consideration was or was not paid in advance.[127] The rule in Vermont was thus stated by Redfield, C. J., in delivering the opinion of the court in Humphreysville Copper Co. *v.* Copper Mining Co.:[128] "The only general damages which the vendee of personal property is entitled to recover for failure to deliver the articles according to the contract, whether the price be paid or not, is the difference between the contract price and the market price of the article at the stipulated time and place of delivery, when the price has advanced, together with the money paid towards the price." And in Hill *v.* Smith,[129] the same learned court, after adverting to the conflict of authority on this question, said: "It has not been adjudged in this State, that payment in advance in such a case varies the rule of damages, and so far as any indication can be gathered from the cases, . . . it seems to be in the direction of not permitting that fact to affect the rule. Upon principle, as well as in view of practical consequences, we prefer the result at which Mr. Sedgwick has arrived, upon a most elaborate and able examination of the subject, that the market value or price on the day of the breach of the contract controls the measure of damages." This is so, also, as we shall presently see, in actions against the vendee. In Rider *v.* Kelley,[130] a case of this kind in the same State, the court said: "It stands upon this reason-

[126] Tempest *v.* Kilner, 2 C. B. 300, 3 C. B. 249; Shaw *v.* Holland, 15 M. & W. 136; Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624.

[127] *Alabama:* Neel *v.* Clay, 48 Ala. 252; Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719.

Illinois: Cushman *v.* Hayes, 46 Ill. 145.

Maine: McKenney *v.* Haines, 63 Me. 74 (*semble*).

Tennessee: Coffman *v.* Williams, 4 Heisk. 233, 240.

[128] 33 Vt. 92, 99.

[129] 32 Vt. 433.

[130] 32 Vt. 268, 273.

able ground, that as the title to the property remains in the seller, he can, upon non-acceptance by the vendee, sell the property at once for its market price, and therefore that the difference between such market price and the contract price will indemnify him against loss." [131] In Rose *v.* Bozeman,[132] it was held that the measure of damages for the breach of a contract to deliver cotton at a specified time and place was its value at the time of the breach, and that the payment of the price in advance did not affect the rule. In Kentucky, where one Yoder covenanted to furnish Allen, by a given day, two slaves, in consideration of $450 then paid, and $210 to be paid on their delivery, it was said by the Court of Appeals, that for a failure to furnish the slaves according to contract, the obligors were liable for damages to Allen. "The measure of those damages was the value of the negroes described at the time and place of performance. This was the province of the jury to ascertain. It has done so, and the amount of consideration did not form a subject of material inquiry." [133]

In Gray *v.* Portland Bank,[134] an action for refusal to accept a subscription for stock, Sedgwick, J., said: "The price of the stock at the time it should be transferred or delivered (and the same rule applies to other personal property) shall be that by which the damages shall be assessed. If the plaintiff intends to *retain* the stock, the then price is what he must pay for an equal amount, and if he intends it for *sale*, that price is what he would obtain for it." And so it was held in Massachusetts,[135] that where the defendant had agreed to deliver a certificate of ten shares of the corporate stock of a certain manufacturing company, whose capital was to be one hundred thousand dollars, divided into not more than two hundred shares, and instead thereof made a tender of a certificate of ten shares of the stock of the company, of which thirty-four thousand dollars only were paid, divided into seventy shares; that the measure of damages was the value of ten shares in the full capital stock, if it had been made up at the time stipulated,

[131] *Acc.*, Cofield *v.* Clark, 2 Colo. 101; Smith *v.* Dunlap, 12 Ill. 184.

[132] 41 Ala. 678; s. c. 40 Ala. 212.

[133] Yoder *v.* Allen, 2 Bibb (Ky.), 338.

[134] 3 Mass. 364, 390, 3 Am. Dec. 151.

[135] Dyer *v.* Rich, 1 Met. 180.

and the company had then been ready in good faith to operate upon the capital, pursuant to their charter.[136]

§ 747. Distinction between stock and merchandise.

In some jurisdictions, though a higher intermediate value is allowed in the case of non-delivery of stock, it is not allowed in the case of other personal property, though the price has been paid in advance. So in Pennsylvania, though, as we have seen, the rule prevails in stock transactions, it is not approved with regard to chattels generally. In an early case [137] it appeared that Woolston bought of Bosler 13,000 *morus multicaulis*, and paid the price; the trees were not delivered. Smethurst, the defendant, gave a guaranty for the performance by Bosler of his contract to deliver the trees on five days' notice. Smethurst being proved liable, it was insisted that the measure of damages was the value of *morus multicaulis* at the time of the breach of contract, or about that time. But the judge who tried the cause said that the sum paid by Woolston, the plaintiff, to Bosler, furnished the rule. On writ of error, the Supreme Court of Pennsylvania held the charge wrong. After noting the case of Shepherd *v.* Hampton, above cited, the court said, it is evident that C. J. Marshall "failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescission of the contract." In the latter case, the court said, the money paid could be recovered; but in the former, the value must be always the measure of damages.

In other jurisdictions it is said that there should be no distinction.[138] So in New York, while the rule giving the vendee the advantage of the rise in value where the price is paid in advance is recognized,[139] no distinction is made between the case of the sale of stocks and other personal property where the price is not paid in advance, and in the former case as well as the latter, the plaintiff is restricted to the difference in mar-

[136] *Acc.*, Struthers *v.* Clark, 30 Pa. 210.

[137] Smethurst *v.* Woolston, 5 W. & S. 106.

[138] *Texas:* Cartwright *v.* McCook, 33 Tex. 612; Gregg *v.* Fitzhugh, 36 Tex. 127.

Virginia: Enders *v.* Board of Public Works, 1 Gratt. 364.

[139] Arnold *v.* Suffolk Bank, 27 Barb. 424.

ket value on the day when the property should have been delivered.[140]

§ 748. No just distinction.

* There appears no solid reason for making any difference between stock and any other vendible commodity. Where stock is loaned, or the price of the article paid for, in either case the party entitled to the delivery parts with his property on the faith of the contract, and in either case is prevented from using it, up to the time of trial. The question is, whether, in either case, the law should act on the assumption that the plaintiff would have retained the property if the contract had been complied with, till the period of the highest value, and have realized that price, and thus give damages which are purely conjectural. It will be noticed that in the case of Clark *v.* Pinney it was intimated by the Supreme Court of New York, that the rule ought to be limited to the case of articles intended for sale; and that in Startup *v.* Cortazzi, it was suggested that the plaintiffs had given no proof of the purpose for which the article was intended; the niceness of the first distinction, the difficulty of furnishing satisfactory proof under the second head, and the general policy of the law which denies conjectural relief, seem strongly to point to the period of breach as the true time, in all cases, of estimating the damages, unless it be shown that the article was to be delivered for some specific object known to both parties at the time, and that thus a loss, within the contemplation of both parties, has been sustained. The fact of payment in advance throws no light on the injury sustained by the purchaser; nor does it at all increase the probability that he would have retained the article till the rise of price. The value of the article at the time of breach, with interest for delay, and subject to the above exception, seems as near an approach to the actual loss sustained as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction.

§ 749. Same reason for rule where property has fallen.

And if this rule be sound, it applies as well to cases where

[140] Belden *v.* Nicolay, 4 E. D. Smith, 14.

the property has fallen as to those where it has risen. The purchaser claims his advance; but if he gets the value of the article at the time of the breach, the contract is performed; and if this sum be less than his advance, his loss is ascribable purely to his own bargain. It may undoubtedly be urged, and with force, that the contract being violated by the defendant, the retention of any part of the plaintiff's money is against conscience. It has already, however, been said that in actions of contract the only object of the tribunal must be to carry into effect the agreement of the parties as far as possible, and that the motives of the defaulter are not to be taken into view. If this be correct, then certainly it removes the last objection to the adoption of the general rule, that the value at the time of the breach, with interest for the delay, is, with the exception of the defendant's liability to make remuneration for loss resulting from facts within the knowledge and in the contemplation of both parties at the time of the contract, to furnish the measure of damages.**

§ 749a. Collateral agreement broken by vendor.

Where the vendor's breach consists not in a failure to deliver the goods sold but in failure to perform some collateral agreement, the ordinary measure of damages for breach of contract applies. So where bicycles were sold by the manufacturer with an agreement to keep the price at a certain figure, and the price was reduced within the time limited, it was held that vendor could recover the difference between the stipulated price and that to which it was reduced, not as profits lost which the vendee would have made, but because by the reduction of the price the vendor had in effect delivered an article of less market value than he had contracted to deliver.[141]

II.—Breach by Vendee

§ 750. Rule where title has passed.

In some cases of sale of personal property the title to the property passes to the purchaser at or before delivery or time for delivery. In these cases the contract fixes the price or it does not. If this point be left doubtful, the value of the article

[141] Lozier *v.* Hannan (Colo.), 54 Pac. 399.

in the market is the rule.[142] * If the vendee resell the article, he can be made liable for the price received, deducting usual charges and commissions. He is treated as a trustee or agent of the plaintiff, selling on his account and for his benefit; and it is both equitable and legal that, having received the money, he should pay it over to the owner, after retaining a due compensation for his services.[143] But this is a very unusual case, and the contract generally fixes the price.

Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement; [144] but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in cases where the title to the goods has passed before delivery and the purchaser refuses to accept that the vendor may resell the goods if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale.[145] Though perhaps more prudent, it is not necessary that the sale should be at auction. It is only requisite to show that the property was sold for a fair

[142] *United States:* Henckley *v.* Hendrickson, 5 McLean, 170.

Arkansas: Burr *v.* Williams, 23 Ark. 244.

Connecticut: Abbott *v.* Wyse, 15 Conn. 254.

Georgia: McCarthy *v.* Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72.

Massachusetts: Taft *v.* Travis, 136 Mass. 95; Deutsch *v.* Pratt, 149 Mass. 415, 14 Am. St. Rep. 430, 21 N. E. 1072.

Michigan: Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

Missouri: Deck *v.* Feld, 38 Mo. App. 674.

New York: Booth *v.* Bierce, 38 N. Y. 463, 98 Am. Dec. 73.

Wisconsin: Althouse *v.* Alvord, 28 Wis. 577.

[143] Greene *v.* Bateman, 2 W. & M. 359.

[144] *Arkansas:* Jackson *v.* Jones, 22 Ark. 158.

Missouri: Fairbanks, Morse & Co. *v.* Midvale Co., 105 Mo. App. 644, 80 S. W. 13.

South Carolina: Suber *v.* Pullin, 1 S. C. 273.

Vermont: Smith *v.* Coolidge, 68 Vt. 516, 35 Atl. 432, 54 Am. St. Rep. 902.

Canada: Phillips *v.* Merritt, 2 Up. Can. C. P. 513.

[145] *New York:* Sands *v.* Taylor, 5 Johns. 395.

England: Langford *v.* Tyler's Adm'r, 1 Salk. 113; s. c. 6 Mod. 162; Cuddee *v.* Rutter, 5 Vin. Abr. 538; s. c. Cud *v.* Rutter, 1 P. Wms. 570.

price.[146] ** But if the vendor does not pursue this course, and without reselling the goods sues the vendee for his breach of contract, the rule appears to be, that where the title to the goods has passed to the vendee, the vendor can recover the contract price in full.[147] And the fact that the goods were destroyed without fault of the vendor before possession was taken does not affect the amount of the recovery.[148]

§ 751. Instances.

* In a suit brought by vendor against vendee, the plaintiff had contracted to sell the defendant three hundred tons of Campeachy logwood; "such as may be determined to be otherwise by impartial judges to be rejected;" the defendant refused to accept the wood offered, because it was not all Campeachy logwood; it was insisted on his behalf that he was not bound by the contract price, as a part only of the stipulated quantity had been furnished; and that the measure of damages was the difference between the contract price and what the article would have sold for at the time when the true quantity of Campeachy logwood was ascertained. But the Court of King's Bench held that the defendant was bound to take the part which was Campeachy, and that, he having repudiated the whole contract, the measure of the damages was the contract price on that quantity, *i. e.*, the Campeachy wood.[149]

[146] *Louisiana:* White *v.* Kearney, 2 La. Ann. 639.

New York: Crooks *v.* Moore, 1 Sandf. 297.

[147] *United States:* Pittsburgh H. & H. S. Co. *v.* Bown, 174 Fed. 981, 98 C. C. A. 593.

Georgia: McCarthy *v.* Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72.

Indiana: Vickery *v.* Evans, 16 Ind. 331; Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382.

Maine: Merrill *v.* Parker, 24 Me. 89, 41 Am. Dec. 374.

Massachusetts: Morse *v.* Sherman, 106 Mass. 430; Pearson *v.* Mason, 120 Mass. 53.

Missouri: Stresovich *v.* Kesting, 63 Mo. App. 57.

New Hampshire: Woolsey *v.* Bailey, 27 N. H. 217.

New York: Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

Pennsylvania: Henderson *v.* Jennings, 228 Pa. 188, 77 Atl. 453, 30 L. R. A. (N. S.) 27.

Wisconsin: Crawford *v.* Earl, 38 Wis. 312.

[148] *Kentucky:* Sweeney *v.* Owsley, 14 B. Mon. 413.

Minnesota: Rail *v.* Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.

New York: Texter *v.* Norton, 55 Barb. 272.

England: Brown *v.* Hare, 3 H. & N. 484; Tarling *v.* Baxter, 6 B. & C. 369.

[149] Graham *v.* Jackson, 14 East, 498.

The question has been considered in New York, and decided in the same way.[150] The plaintiff, a carriage-maker, was employed to build a sulky for the defendant. A due tender having been made of the carriage, and it being deposited with a third person, the defendant having refused payment, and suit brought, it was insisted that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc.; but the court held otherwise.[151]

It has been held in Pennsylvania, where goods are sold at auction on credit, and the vendee refuses to take them, the owner may, before the expiration of the credit, sue the vendee for his breach of contract; and in such case, the measure of damages is the difference between the price agreed to be paid for the goods and their value at the time that the vendee refused to take them. This is clearly so, because no action can be brought *for the price* of the goods until the time of credit is expired. But in this case, Gibson, J., proceeded to say: "Properly speaking, the seller cannot *recover the price where he has retained the goods* in consequence of the buyer's refusing to comply with any part of the contract." [152] So in Massachusetts, where a contract had been made for the purchase of railway shares, and a part of the price paid, and the vendor caused them to be transferred on the books of the company, but the defendant refused to accept them after such transfer, it was held that the measure of damages was the contract price.[153]

[150] Bement *v.* Smith, 15 Wend. 493, 496.

[151] See to the same effect the following cases:

Iowa: McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa, 340, 78 N. W. 33.

Massachusetts: Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112.

Missouri: Crown Vinegar & Spice Co. *v.* Wehrs, 59 Mo. App. 493; Black River L. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210, 3 Am. St. Rep. 544.

Nebraska: Lincoln Shoe Manuf. Co. *v.* Sheldon, 44 Neb. 279, 62 N. W. 480, 69 Am. St. Rep. 716 (but see Finke *v.* Allen, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832).

New York: Reed *v.* Hayt, 109 N. Y. 659; 17 N. E. 418.

Oregon: Smith *v.* Wheeler, 7 Ore. 49, 33 Am. Rep. 698.

Pennsylvania: Ballentine *v.* Robinson, 46 Pa. 179; Reynolds *v.* Callender, 19 Pa. Super. Ct. 610.

[152] Girard *v.* Taggart, 5 S. & R. 19, 34.

[153] Thompson *v.* Alger, 12 Met. 428.

§ 752. Manufacturing contracts.

A contract for the manufacture of a certain article is in some jurisdictions regarded as a contract for work and labor; in others, as a contract of sale. In the former case the title to the finished article is in the party who orders the article; in the latter case it may be in one party or the other, according to circumstances. In either case, however, if the title is regarded by the court as being in the defendant, the manufacturer should be allowed the full contract price.[154] If the title is still in the manufacturer, however, the measure of damages is not so clear. It is often said that the usual rule in case of a breach by the vendee does not apply to contracts for manufacture, and that the amount of recovery should be the difference between the cost of manufacture and the contract price even though the vendor has completed the articles and tendered them before the vendee has repudiated.[155] Clearly, however, to lay this down as a general rule would be too sweeping. The manufacturer has the goods on hand, and may probably dispose of them to advantage elsewhere. To be sure if the goods are made expressly for the defendant, and will be of value to him alone, the plaintiff should recover the entire contract price less the amount saved him by the defendant's breach,[156] deducting any amount which the plaintiff has obtained by sale to others,[157]

[154] *United States:* Bookwalter *v.* Clark, 11 Biss. 126.

New Hampshire: Gordon *v.* Norris, 49 N. H. 376.

Ohio: Shawhan *v.* Van Nest, 25 Oh. St. 490, 18 Am. Rep. 313.

Pennsylvania: Ballentine *v.* Robinson, 46 Pa. 177.

[155] *United States:* Olyphant *v.* St. Louis Ore & Steel Co., 28 Fed. 729; Lincoln *v.* Levi Cotton Mill Co., 128 Fed. 865.

California: Hale *v.* Trout, 35 Cal. 230.

Illinois: Kingman & Co. *v.* Hanna Wagon Co., 176 Ill. 545, 52 N. E. 328.

Missouri: Chapman *v.* Kansas City, etc., Co., 146 Mo. 481, 48 S. W. 646.

Nebraska: Diels *v.* Kennedy, 88 Neb. 777, 130 N. W. 740.

New York: Dryfoos *v.* Uhl, 69 App. Div. 118, 74 N. Y. Supp. 532; Oswego F. P. & P. Co. *v.* Stecher Lithographic Co., 130 N. Y. Supp. 897.

Pennsylvania: Mitchell *v.* Baker, 208 Pa. 377, 57 Atl. 760.

Virginia: Duke *v.* Norfolk & W. Ry., 106 Va. 152, 55 S. E. 548.

[156] *New York:* Isaacs *v.* Terry & Tench Co., 132 App. Div. 657, 117 N. Y. Supp. 369, 113 N. Y. Supp. 731, 125 App. Div. 532, 109 N. Y. Supp. 792, 56 Misc. 586, 107 N. Y. Supp. 136.

Pennsylvania: Ridgeway D. & E. Co. *v.* Pennsylvania Cement Co., 221 Pa. 160, 70 Atl. 557, 18 L. R. A. (N. S.) 613.

[157] *Kentucky:* Louisville & N. R. R. *v.* Coyle, 30 Ky. L. Rep. 201, 97 S. W. 772, 8 L. R. A. (N. S.) 433.

or, obviously, anything which it can be proved with reasonable certainty that he might obtain. Even though the goods are not especially adapted to the purpose for which they are manufactured, still if there is no market for them it is impossible to show what the manufacturer could sell them for; and the cost of manufacture is therefore the criterion.[158] If, however, the goods have been manufactured and are on hand, and they have a market value, the plaintiff may realize that value by selling them; and his measure of loss in the ordinary case should therefore be restricted to the difference between the contract and the market price.[159]

Where the defendant repudiated the contract before the manufacture was completed, the rule just considered cannot apply, because the breach does not leave the manufactured product on the plaintiff's hands; hence we have to fall back on the general rule that the measure of damages is the net profits of the contract: *i. e.*, the difference between the contract price and the cost of manufacture, after making due allowance for the value of materials on hand, etc.[160]

New York: Isaacs *v.* Terry & Tench Co., 132 App. Div. 657, 117 N. Y. Supp. 369.

[158] Willis *v.* Jarrett Const. Co., 152 N. C. 100, 67 S. E. 265.

[159] *United States:* Knowlton *v.* Oliver, 28 Fed. 516; Malcomson *v.* Reeves Pulley Co., 167 Fed. 939, 93 C. C. A. 339.

Alabama: Gate City Cotton Mills *v.* Rosenau Hosiery Mills, 159 Ala. 414, 49 So. 228.

Delaware: Speakman *v.* Price, 80 Atl. 627 (crop of tomatoes).

Kansas: Geiss *v.* Hardware Co., 37 Kan. 130.

Kentucky: Louisville & N. R. R. *v.* Coyle, 30 Ky. L. Rep. 201, 97 S. W. 772, 8 L. R. A. (N. S.) 433.

Maine: Tufts *v.* Grewer, 83 Me. 407, 22 Atl. 382.

North Carolina: Marshall *v.* Macon County Savings Bank, 108 N. C. 639, 13 S. E. 182; Cleveland-Canton Springs Co. *v.* Goldsboro Buggy Co., 148 N. C. 533, 62 S. E. 637; Pool *v.* Walker, 72 S. E. 70 (output of shingle mill).

Pennsylvania: Puritan Coke Co. *v.* Clark, 204 Pa. 556, 54 Atl. 350.

Wisconsin: Lincoln *v.* Charles Alshuler Mfg. Co., 142 Wis. 475, 125 N. W. 908, 28 L. R. A. (N. S.) 780.

See also a learned note, 4 L. R. A. (N. S.) 740.

[160] *United States:* United States *v.* Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81; Hinckley *v.* Pittsburg B. S. Co., 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. 875; Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; Portland Co. *v.* Searle, 169 Fed. 968.

Delaware: Taylor *v.* Trustees of Poor, 63 Atl. 613.

Indiana: W. J. Holliday & Co. *v.* Highland I. & S. Co., 43 Ind. App. 342, 87 N. E. 249.

Iowa: Kimball *v.* Deere, 108 Ia. 676, 684, 77 N. W. 1041; Thistle Coal Co. *v.* Rex C. & M. Co., 132 Ia. 592, 109 N. W. 1094.

In a carefully considered case in the Circuit Court of Appeals for the eighth circuit,[161] the following rules were laid down: 1. For breach of a contract to purchase, the ordinary rule is the difference between the contract and market price, if the latter be less than the former. 2. The same rule applies in the case of a contract to purchase goods to be manufactured, if they are ready for delivery at the time of the breach, otherwise not. 3. Where, before notice of the breach, materials have been purchased and labor expended, the vendor's damages are the difference between the amount it would cost him to make and deliver them, and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials, if the cost be greater than the value. 4. If materials have been purchased, but no labor expended, the measure of damages is the difference between what it would cost to make and deliver, including the cost of the materials, and their contract price, if greater, plus the difference between the cost, and the market value of the materials purchased at the time of the breach, if the latter be less than the former. 5. If no materials have been bought, or labor expended, the measure of damages is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that is greater than their cost.

As a general rule when the vendee gives notice of repudiation

Kentucky: Gaither *v.* Bland, 7 Ky. L. Rep. 518.

Missouri: Black River L. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210, 3 Am. St. Rep. 544; American Publishing & Engraving Co. *v.* Walker, 87 Mo. App. 503.

New York: Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982; Masterton *v.* the Mayor, 7 Hill, 61; Bishop *v.* Autographic Register Co., 19 App. Div. 268, 46 N. Y. Supp. 97; Kelso *v.* Marshall, 24 App. Div. 128, 49 N. Y. Supp. 728; H. D. Taylor Co. *v.* Niagara Bedstead Co., 52 Misc. 356, 102 N. Y. Supp. 173; Lehmaier *v.* Standard S. & T. Co., 123 App. Div. 431, 108 N. Y. Supp. 402; Thomas *v.* Cauldwell, 58 N. Y. 142.

Pennsylvania: Puritan Coke Co. *v.* Clark, 204 Pa. 556, 54 Atl. 350; Winslow Bros. Co. *v.* Du-Puy, 208 Pa. 98, 57 Atl. 189; Imperial R. S. Co. *v.* Steinfeld Bros., 81 Atl. 413.

Tennessee: Gardner *v.* Deeds, 116 Tenn. 128, 92 S. W. 518, 4 L. R. A. (N. S.) 740, and case note at p. 740, collecting many cases.

Wisconsin: Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; Walsh *v.* Myers, 92 Wis. 297, 66 N. W. 250.

[161] Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

before the vendor has manufactured the goods the vendor cannot increase the damages by going on with the contract and completing the goods. If, however, he does complete them, and thereby his damages are lessened, the amount of his recovery is measured by the market value and not the cost of manufacture.[162] Whenever the circumstances do justify the completion by the vendor he may invoke, to his own advantage, the usual rule of damages for breach by the vendee and recover the difference between the contract price and the market value of the articles. Thus when the plaintiff was manufacturing out of cotton seed, by the same process, a variety of products and sold a year's output of two of these products in advance to the defendant, who gave notice that he would not receive the product; it was held that plaintiff was not obliged to stop and sue but might execute the contract on his side and claim damages as in the case of an ordinary sale.[163]

§ 752a. Property to be severed from the realty.

The rule allowing the difference between the contract price and the cost of production has been applied to contracts for the sale of minerals,[164] gravel [165] and of standing timber, to be cut by the seller.[166]

§ 753. Rule where title has not passed.

Where the title has not passed, the measure of damages is the difference between the contract and the market price of

[162] *United States:* Hemmingway Manuf. Co. *v.* Council Bluffs Canning Co., 62 Fed. 897.

Wisconsin: Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

See, however, Southern Cotton Oil Co. *v.* Hefflin, 99 Fed. 339, 39 C. C. A. 546.

[163] Southern Cotton Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546.

[164] *United States:* Engineering Co. *v.* Broadman, 136 Fed. 351 (granite).

Pennsylvania: Scott *v.* Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753; C. P. Mayer Brick Co. *v.* D. J. Kennedy Co., 230 Pa. 98, 79 Atl. 246 (brick).

Virginia: Allegheny Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

[165] *California:* Coburn *v.* Cal. Cement Co., 144 Cal. 81, 77 Pac. 771.

West Virginia: Hare *v.* Parkersburg, 24 W. Va. 554.

So of cracked stone: Viernow *v.* Carthage, 139 Mo. App. 276, 123 S. W. 67.

[166] Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800; Willis *v.* Jarrett Const. Co., 152 N. C. 100, 67 S. E. 265.

the article at the time when and the place where it should have been accepted.[167] "The vendor of personal property in a suit

[167] *United States:* Friedenstein *v.* United States, 35 Ct. Cl. 1; Rhodes *v.* Cleveland Rolling Mill Co., 17 Fed. 426; Knowlton *v.* Oliver, 28 Fed. 516; Fisher *v.* Newark City Ice Co., 62 Fed. 569, 10 C. C. A. 546, 76 Fed. 427, 22 C. C. A. 261; Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. 569, 12 C. C. A. 306; Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503; Salem Iron Co. *v.* Lake Superior Consolidated Iron Mines, 112 Fed. 239, 50 C. C. A. 213; Denver E. W. Co. *v.* Elkins, 179 Fed. 922.

Alabama: Cassels' Mills *v.* Strater Bros. Grain Co., 166 Ala. 224, 51 So. 969; Scruggs *v.* Riddle, 54 So. 641.

Arkansas: Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342; Nelson *v.* Hirschberg, 70 Ark. 39, 66 S. W. 347.

California: Haskell *v.* McHenry, 4 Cal. 411; Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020; Scribner *v.* Schenkel, 128 Cal. 250, 60 Pac. 860; Central Oil Co. *v.* Southern Refining Co., 154 Cal. 165, 97 Pac. 177; Levis *v.* Royal Packing Co., 1 Cal. App. 241, 81 Pac. 1086.

Colorado: Kincaid *v.* Price, 18 Colo. App. 73, 70 Pac. 153.

Delaware: Barr *v.* Logan, 5 Harr. 52.

Georgia: Groover *v.* Warfield, 50 Ga. 644; Camp *v.* Hamlin, 55 Ga. 259; Barrett *v.* Verdery, 93 Ga. 526, 21 S. E. 64; Georgia R. R. *v.* Augusta O. Co., 74 Ga. 497.

Illinois: Thrasher *v.* Pime County R. R., 25 Ill. 393; McNaught *v.* Dodson, 49 Ill. 446; Ullmann *v.* Kent, 60 Ill. 271; Burnham *v.* Roberts, 70 Ill. 19; Sanborn *v.* Benedict, 78 Ill. 309; Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548; Thurman *v.* Wilson, 7 Ill. App. 312; Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717; Great W. C. & C. Co. *v.* St. Louis & B. M. C. C. Co., 140 Ill. App. 368; Finch *v.* Zenith F. Co., 146 Ill. App. 257.

Indiana: Pittsburgh, C. & St. L. Ry. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713; Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140; McComas *v.* Haas, 107 Ind. 512, 57 Am. Rep. 128; Ridgley *v.* Mooney, 16 Ind. App. 362, 45 N. E. 348; Browning *v.* Simons (Ind.), 46 N. E. 86; Dill *v.* Mumford, 49 N. E. 861 (Ind.).

Iowa: Harris Manuf. Co. *v.* Marsh, 49 Ia. 11; Hamilton *v.* Finnegan, 117 Ia. 623, 91 N. W. 1039.

Kansas: Lawrence Tanning Co. *v.* Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749.

Kentucky: Williams *v.* Jones, 1 Bush, 621; Bell *v.* Hatfield, 121 Ky. 560, 89 S. W. 544, 2 L. R. A. (N. S.) 529; J. Zinsmeister & Bro. *v.* Rock Island Canning Co., 139 S. W. 1068.

Louisiana: Jochams *v.* Ong, 45 La. Ann. 1289, 1294, 14 So. 247.

Maine: Tufts *v.* Grewer, 83 Me. 407, 22 Atl. 382; Bonney *v.* Blaisdell, 105 Me. 121, 73 Atl. 811.

Massachusetts: Collins *v.* Delaporte, 115 Mass. 159; Whitney *v.* Thacher, 117 Mass. 523; Tufts *v.* Bennett, 163 Mass. 398, 40 N. E. 172; Moffatt *v.* Davitt, 200 Mass. 452, 86 N. E. 929.

Michigan: Brownlee *v.* Bolton, 44 Mich. 218; Simons *v.* Ypsilanti Paper Co., 77 Mich. 185, 43 N. W. 864; Peters *v.* Cooper, 95 Mich. 191, 54 N. W. 694, 35 Am. St. Rep. 554; Mohr Hardware Co. *v.* Dubey, 136 Mich. 677, 100 N. W. 127; Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057.

Missouri: Whitmore *v.* Coats, 14 Mo. 9; Lee *v.* Sickles Saddlery Co., 38 Mo. App. 201; Northrup *v.* Cook, 39 Mo. 208 (*semble*); Black River L. Co. *v.* Warner, 93 Mo. 374, 3 Am. St. Rep. 544; Brown *v.* Trinidad A. M. Co., 210

against the vendee for not taking and paying for the property," said Earl, C., in Dustan *v.* McAndrew,[168] "has the choice

Mo. 260, 109 S. W. 22; Parlin *v.* Boatman, 84 Mo. App. 67.

Nebraska: Dodge *v.* Keine, 28 Neb. 216, 44 N. W. 191; Lincoln Shoe Co. *v.* Sheldon (Neb.), 44 N. W. 279; Funke *v.* Allen, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; Backes *v.* Black, 97 N. W. 321; Trinidad A. M. Co. *v.* Buckstaff Bros. Mfg. Co., 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710; Tacoma Mill Co. *v.* F. H. Gilcrest Lumber Co., 132 N. W. 926.

New Hampshire: Stevens *v.* Lyford, 7 N. H. 360; Rand *v.* White Mountains Railroad, 40 N. H. 79; Gordon *v.* Norris, 49 N. H. 376; Haines *v.* Tucker, 50 N. H. 307; Tripp *v.* Forsaith Mach. Co., 69 N. H. 23.

New Jersey: Massman *v.* Steiger, 79 N. J. L. 442, 75 Atl. 746.

New York: Pollen *v.* Le Roy, 30 N. Y. 549; Dustan *v.* McAndrew, 44 N. Y. 72; Hayden *v.* Demets, 53 N. Y. 426; Bridgford *v.* Crocker, 60 N. Y. 627; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 199; Canda *v.* Wick, 100 N. Y. 127; Billings *v.* Vanderbeck, 23 Barb. 546; Mallory *v.* Lord, 29 Barb. 454; Hewitt *v.* Miller, 61 Barb. 567; Kirschmann *v.* Lediard, 61 Barb. 573; Duryea *v.* Rayner, 46 N. Y. Supp. 437; Deery *v.* Williams, 50 N. Y. Supp. 138; National Cash Register Co. *v.* Schmidt, 48 App. Div. 472, 62 N. Y. Supp. 952; Schwartzenbes *v.* Hass, 74 N. Y. Supp. 884; Kiley *v.* Lee Canning Co., 93 N. Y. Supp. 986; Lekas *v.* Schwartz, 56 Misc. 954, 107 N. Y. Supp. 145; Netter *v.* Trenton W. B. Works, 140 App. Div. 287, 125 N. Y. Supp. 141.

North Carolina: Clements *v.* State, 77 N. C. 142.

North Dakota: Minneapolis T. M. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

Ohio: Nixon *v.* Nixon, 21 Oh. St. 114; Cullen *v.* Bimm, 37 Oh. St. 236.

Oregon: Krebs Hop Co. *v.* Livesley, 114 Pac. 944, 118 Pac. 165.

Pennsylvania: Unexcelled Fireworks Co. *v.* Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; Dorser *v.* Hale, 149 Pa. 274, 24 Atl. 285; Herd *v.* Thompson, 149 Pa. 434, 24 Atl. 282; Jones *v.* Jennings, 168 Pa. 493, 32 Atl. 51; Guillou *v.* Farnshaw, 169 Pa. 463, 32 Atl. 545; Sharpsville Furnace Co. *v.* Snyder, 223 Pa. 372, 72 Atl. 786; Charles J. Webb & Co. *v.* Novelty Hosiery Co., 231 Pa. 297, 80 Atl. 173; Andrews *v.* Hoover, 8 Watts, 239; Keeler Co. *v.* Schott, 1 Pa. Super. Ct. 458; Schnelby *v.* Shirteliff, 7 Phila. 236.

South Carolina: Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687; Millar *v.* Hilliard, Cheves, 149.

South Dakota: Dowagiack Mfg. Co.

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[168] 44 N. Y. 72, 78.

See to the same effect the following cases:

United States: Habeler *v.* Rogers, 131 Fed. 43.

Colorado: Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879.

Indiana: Dwiggins *v.* Clark, 94 Ind. 49.

Kentucky: Cook *v.* Brandies, 3 Met. 555.

Missouri: Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555.

Oregon: Krebs Hop Co. *v.* Livesley, 118 Pac. 165.

Tennessee: Cook *v.* Zucarello, 104 Tenn. 64, 56 S. W. 850.

The rules laid down above apply to all kinds of personal property, *e. g.*, an interest in a partnership. Van Brocklin *v.* Smallie, 140 N. Y. 70, 35 N. E. 415.

ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." The remedies are, however, mutually exclusive and when the vendor has chosen one, the others are gone forever; [169] and in many jurisdictions he is restricted to the third remedy.[170] In Fisher *v.* Newark City Ice Co.,[171] when the vendee refused to receive ice under a contract the court said that from the contract price must be deducted not only the market value but also the expense of loading, etc., saved to the plaintiff by the failure to take it. Where a purchaser extends the time for the delivery of goods, the vendor, suing for a failure to accept, recovers the difference between the contract price and the value at a reasonable time after a final demand for the vendee to take them.[172] The market price at the place to which the defendant intended to ship the goods cannot be taken.[173]

v. White Rock Lumber Co., 18 S. Dak. 105, 99 N. W. 854.

Tennessee: Cole *v.* Zucarello, 104 Tenn. 64, 56 S. W. 850; Alpha P. C. Co. *v.* Oliver, 140 S. W. 595.

Texas: Woldert *v.* Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052; Avant *v.* Watson, 122 S. W. 586.

Virginia: Oriental Lum. Co. *v.* Blades Lum. Co., 103 Va. 730; Am. Can'g Co. *v.* Flat Top Grocery Co., 70 S. E. 756.

West Virginia: Weltners *v.* Riggs, 3 W. Va. 445; Hall *v.* Pierce, 4 W. Va. 107; James *v.* Adams, 8 W. Va. 568; s. c. 16 W. Va. 245; Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

Wisconsin: Ganson *v.* Madigan, 13 Wis. 67; Chapman *v.* Ingram, 30 Wis. 290; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666; Pratt *v.* S. Freeman & Sons Manuf. Co., 115 Wis. 648, 92 N. W. 368; Carle *v.* Nelson, 145 Wis. 593, 130 N. W. 467.

England: Hickman *v.* Haynes, L. R. 10 C. P. 598.

Canada: Chapman *v.* Larin, 4 Can. 349; Boswell *v.* Kilborn, 6 Low. Can. Jur. 108; Moore *v.* Logan, 5 Up. Can. C. P. 294.

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[169] Westfall *v.* Peacock, 63 Barb. 209.

[170] Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

[171] 76 Fed. 427, 17 U. S. App. 514, 525, 22 C. C. A. 261.

[172] *Virginia:* Smith *v.* Snyder, 77 Va. 432.

England: Hickman *v.* Haynes, L. R. 10 C. P. 598.

[173] Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 199.

Where the contract price and the market price are the same, only nominal damages can be recovered;[174] and the same is true where the sale is at such price as should be mutually agreed upon.[175] So where the plaintiff has not the goods that he agrees to sell, but makes a side-contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer, with interest.[176] If the property is worthless in the hands of the plaintiff, the whole price agreed should be recovered.[177] Where a quantity of straw was sold, a portion of which only was taken away, and the buyer subsequently refused to take the remainder, and the vendor threw it, the next spring, it having become damaged, into the barn-yard to his cattle, it was held that the measure of damages against the vendee for refusing to complete his contract was the contract price, less its value to the vendor for the use to which it was applied.[178] When there is no market at the place of delivery the price of getting the goods to the nearest market is to be subtracted from (or, as the case may be, added to) the price at that market in order to find the value at the place of delivery.[179] Where there is no open market, the best offer ob-

[174] *United States:* Ellithorpe A. B. Co. *v.* Sire, 41 Fed. 662.

California: Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406.

Illinois: Foos *v.* Sabin, 84 Ill. 564.

Iowa: Wire *v.* Foster, 62 Ia. 114.

[175] Smith *v.* Loag, 132 Pa. 301, 19 Atl. 137. See Indiana Tie Co. *v.* Phelps (Ky.), 124 S. W. 833.

[176] *New York:* Stanton *v.* Small, 3 Sandf. 230.

Vermont: Danforth *v.* Walker, 37 Vt. 239.

So, too, in *Ohio:* M'Naughter *v.* Cassally, 4 M'Lean, 530; though in this case it is said a portion of the property was ready to be delivered.

[177] Allen *v.* Jarvis, 20 Conn. 38. So of an agreement with a corporation to buy a portion of its capital stock; upon breach, the corporation may recover the entire purchase price. Person & Riegel Co. *v.* Lipps, 219 Pa. 99, 67 Atl. 1081. And where defendant contracted to buy plaintiff's stock, which was at the time in the hands of a pledgee, but refused to pay for it, and the stock was thereupon sold to satisfy the lien and was bought in and divided by the pledgee and the defendant it was held that defendant had really deprived plaintiff of the stock, and must pay the agreed price. Lydon *v.* Sullivan, 101 S. W. 940, 31 Ky. Law Rep. 227.

[178] Chamberlain *v.* Farr, 23 Vt. 265.

[179] *United States:* Grand Tower Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71; Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503; Salmon *v.* Helena Box Co., 147 Fed. 408, 77 C. C. A. 586.

Arkansas: Kirchman *v.* Tuffli Bros. P. I. & C. Co., 92 Ark. 111, 122 S. W. 239.

tainable will constitute competent evidence of the value. In any case it is the actual value which furnishes the standard:[180] the market price is only evidence of this.[181]

§ 754. Rescission.

The question of the rescission of a contract must not be confounded with the question of breach. It is settled that a breach may arise by refusal of one of the parties to go on with performance.[182] This, however, is not recission. Parties can only rescind a contract by annulling it, or withdrawing themselves from it altogether, in which case it is as if it had been voluntarily cancelled by both. In such an event, it would seem that properly speaking damages for a breach should not be allowed; the plaintiff should recover, but not on the basis of the contract. The consequences of rescission depend on the circumstances of the particular case. And so where plaintiff and defendant contracted for the sale of 50,000 bricks, and the plaintiff delivered 20,000, when the defendant wrongfully refused to receive any more and the plaintiff treated the contract as rescinded, it was held that plaintiff was entitled to recover the full market value of those delivered.[183] But where the defendant refused to fulfil his agreement to take back stock he had sold the plaintiff, this was regarded by the court as a rescission of the contract of sale, only so far as to revest the title to the stock in the defendant; and the plaintiff was allowed to recover the full price agreed upon.[184] And where a misunderstanding arose between the parties to a sale, and it was agreed

[180] *Delaware:* Pancoast *v.* Vail, 6 Pennew. 512, 65 Atl. 512.

Missouri: St. Louis S. R. Co. *v.* Kline-Drummond M. Co., 120 Mo. App. 438, 96 S. W. 1040.

Montana: Welch *v.* Nichols, 41 Mont. 435, 110 Pac. 89.

So if no value is proved, damages must be nominal. Fisher H. S. & M. Co. *v.* Warner, 188 Fed. 465.

[181] *United States:* Salem Iron Co. *v.* Lake Superior Iron Mines, 112 Fed. 239, 50 C. C. A. 213.

Massachusetts: Barry *v.* Cavanagh, 127 Mass. 394.

[182] Hochster *v.* De La Tour, 2 E. & B. 678. For a discussion of Rescission generally, see *ante*, Ch. xxx.

[183] *New York:* Terwilliger *v.* Knapp, 2 E. D. Smith, 86.

Washington: Houser & H. M. Co. *v.* McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925.

[184] *Massachusetts:* Thorndike *v.* Locke, 98 Mass. 340.

Minnesota: Browne *v.* St. Paul Plow Works, 62 Minn. 90, 64 N. W. 66.

Pennsylvania: Laubach *v.* Laubach, 73 Pa. 387.

that the sale should be cancelled and the buyer should return the goods, and he failed to do so, it was held that the seller might recover at his option the actual value of the goods.[185] In the ordinary case of a contract procured by fraud the party defrauded is said to be entitled to rescind it and recover back what he has parted with. There obviously the contract is treated as a nullity, the fraud being the cause of action.[186]

§ 755. Resale after default.

It is often said that where the vendor resells the property, the difference between the price obtained at the resale and the contract price is absolutely the measure of damages;[187] or,

[185] American F. & F. Co. *v.* Settergren, 130 Wis. 338, 110 N. W. 238.

[186] Whitney *v.* Albani, 1 N. Y. 305; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123.

[187] *United States:* Pope *v.* Filby, 3 McCr. 190.

Alabama: Penn *v.* Smith, 93 Ala. 476, 9 So. 609, 98 Ala. 560, 12 So. 818.

California: Habenocht *v.* Lisak, 77 Cal. 139, 19 Pac. 260; Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Gibbs *v.* Ranard, 86 Cal. 531, 25 Pac. 63; Scribner *v.* Schenkel, 128 Cal. 250, 60 Pac. 860.

Colorado: Colorado Springs Livestock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529; Magnes *v.* Sioux City Seed Co., 14 Colo. App. 219, 59 Pac. 879.

Delaware: Barr *v.* Logan, 5 Harr. 52.

Illinois: Saladin *v.* Mitchell, 45 Ill. 79; Morris *v.* Wilbaux, 159 Ill. 627, 43 N. E. 837.

Iowa: Ingram *v.* Wackernagel, 83 Ia. 82, 48 N. W. 998.

Kentucky: Marshall *v.* Piles, 3 Bush, 249; Applegate *v.* Hogan, 9 B. Mon. 69; Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687; Sanders *v.* Bond, 23 Ky. L. Rep. 2084, 66 S. W. 635.

Maine: Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Massachusetts: McLean *v.* Richardson, 127 Mass. 339.

Michigan: Madden *v.* Lemke, 86 Mich. 139, 48 N. W. 785.

Missouri: Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Dec. 52; Black River L. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210, 3 Am. St. Rep. 544.

New Jersey: Townsend *v.* Simon, 38 N. J. L. 239.

New York: Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; Crooke *v.* Moore, 1 Sandf. 297; Schwartzenbes *v.* Hass, 74 N. Y. Supp. 884.

North Carolina: Clifton *v.* Newsom, 1 Jones, 108.

Oklahoma: Mansur *v.* Willard, 10 Okla. 383, 61 Pac. 1066.

Pennsylvania: Tompkins *v.* Haas, 2 Pa. 74; Tindle's Appeal, 77 Pa. 201.

South Carolina: Blackwood *v.* Brennan, 1 Harp. 219.

Tennessee: Williams *v.* Godwin, 4 Sneed, 558.

Virginia: Rosenbaums *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737; American Canning Co. *v.* Flat Top Grocery Co., 70 S. E. 756.

West Virginia: James *v.* Adams, 8 W. Va. 568.

Wisconsin: Pickering *v.* Bardwell, 21 Wis. 562, 94 Am. Dec. 564; T. B. Scott Lumber Co. *v.* Hafner-Lothman Manuf. Co., 91 Wis. 667, 65 N. W. 513.

England: Anderson *v.* Beard, [1900] 2 Q. B. 260.

more exactly, the difference between the net proceeds of the resale (the price obtained less the expense) and the contract price.[188] The vendor, in such a case, is said to be the agent of the vendee to make the resale. This is not, however, strictly accurate. He is not an actual agent and the obligation under which he rests to make a fair sale arises from the fact that the proceeds of the sale are to measure the damages: to call him the agent of the vendee is to indulge in a "mere fiction of law." This is well brought out in a New York case,[189] where the vendee company, after refusing to accept goods purchased, went into the hands of a receiver. The vendor re-sold the goods and sought to recover the difference between the proceeds and the contract price. It was objected that to recover that amount the vendor had to rely on the doctrine of agency and that as the agent of one who was in the hands of a receiver he had no right to resell without first securing an order from the court. The vendor, however, was awarded the sum which he claimed, the court distinctly repudiating the agency theory, and holding that the title remained in the vendor.

The price obtained on a resale is therefore not a conclusive measure of damages and it is more properly held that it is only evidence of the market value.[190] Since, however, the sale

Canada: Brunskill *v.* Mair, 15 Up. Can. Q. B. 213.

[188] *Arizona:* Slaughter *v.* Marlow, 3 Ariz. 429, 31 Pac. 547.

Georgia: Barnes *v.* Bluthenthal, 101 Ga. 598, 28 S. E. 1017, 65 Am. St. Rep. 598.

Illinois: Bagley *v.* Findlay, 82 Ill. 524.

Kentucky: Mattingly *v.* Mathews, 14 Ky. L. Rep. 300.

Massachusetts: Whitney *v.* Boardman, 118 Mass. 242.

Missouri: Whitmore *v.* Coats, 14 Mo. 9; Strauss *v.* Labsap, 59 Mo. App. 260.

New York: Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012.

South Carolina: Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660, 27 Am. St. Rep. 839.

Texas: White *v.* Matador Land & C. Co., 75 Tex. 465, 12 S. W. 866.

Wisconsin: Chapman *v.* Cochran, 30 Wis. 295.

[189] Moore *v.* Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692. *Cf.* Pollen *v.* Le Roy, 30 N. Y. 549.

[190] *California:* Frisbie *v.* Rosenberg Bros. & Co., 9 Cal. App. 583, 105 Pac. 943.

Georgia: Camp *v.* Hamlin, 55 Ga. 259; Atkins *v.* Cobb, 56 Ga. 86; Davis Sulphur Ore Co. *v.* Atlanta Guano Co., 109 Ga. 607, 34 S. E. 1011.

Illinois: Ullmann *v.* Kent, 60 Ill. 271.

Kentucky: Sanders *v.* Bond, 23 Ky. L. Rep. 2084, 66 S. W. 635.

Massachusetts: Croak *v.* Owens, 121 Mass. 28.

Michigan: Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352, 53 Am. St. Rep. 457.

must be conducted with due diligence so as to obtain the best price, the price realized is, perhaps, the best evidence of market value. It is sometimes said that the price obtained or a resale will be binding on the defendant only if he had notice of the resale.[191] The importance of the notice, however, seems to be only in negativing any possible presumption that the vendor intended a rescission of the contract or in tending to show good faith on the part of the vendor.

Where the sale is made by one acting in an official capacity, as an administrator, the difference between the prices of the two sales is, it would seem, the absolute measure of damages.[192] A resale will not furnish the measure of damages, if it does not take place within a reasonable time after the failure to accept. In Smith *v.* Pettee,[193] it was held that four months was not a reasonable time. Nor is it necessary for the vendor to resell at the place of delivery fixed by the contract. If the property cannot readily be sold there, or if a more advantageous sale can be made elsewhere, it is the duty of the vendor to make the resale at such other place.[194]

New Hampshire: Tripp *v.* Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746.

New York: Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 728; Fancher *v.* Goodman, 29 Barb. 315; Almy *v.* Simonson, 52 Hun, 535.

Pennsylvania: Freyman *v.* Knecht, 78 Pa. 141; Guillou *v.* Farnshaw, 169 Pa. 463, 32 Atl. 545; Firard *v.* Taggard, 5 S. & R. 19, 9 Am. Dec. 327; Andrews *v.* Hoover, 8 Watts, 239; Baltimore Smelting Co. *v.* Ammonia Co., 2 Pa. Super. Ct. 555; Hooper *v.* Bromley Brothers Carpet Co., 11 Pa. Super. Ct. 634.

Texas: Leonard *v.* Portier, 15 S. W. 414.

Wisconsin: Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666, 116 Wis. 263, 93 N. W. 26.

[191] *Illinois:* Bagley *v.* Findlay, 82 Ill. 524.

Missouri: Rickey *v.* Tenbroeck, 63 Mo. 563.

New York: Pollen *v.* Le Roy, 30 N. Y. 549; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; McEachron *v.* Randles, 34 Barb. 301.

[192] *Alabama:* Lamkin *v.* Crawford, 8 Ala. 153 (sheriff).

Georgia: Alexander *v.* Herring, 54 Ga. 200.

Pennsylvania: Gaskell *v.* Morris, 7 W. & S. 33.

So where the sale was necessary because the property was perishable. Ziegler *v.* Gerlach (Tex. Civ. App.), 125 S. W. 80.

[193] 7 Hun, 334. *Cf.* Lawrence Canning Co. *v.* Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749 (one month too long). In Zinsmeister & Bro. *v.* Rock Island Canning Co. (Ky.), 139 S. W. 1068, it was held to be a question for the jury whether about four months was reasonable.

[194] *New York:* Lewis *v.* Greider, 49 Barb. 606.

Texas: Waples *v.* Overaker, 77 Tex.

The question must be determined by all the circumstances. In a case of the sort under discussion, where, after notice, the seller resold the goods at auction, the Court of Appeals of New York said: [195] "The price obtained after such default, upon a resale, within a reasonable time, although at auction, is evidence of the market value of an article and to be allowed such weight as the circumstances of the sale entitled it to." And, on the other hand, a resale at private sale, without reasonable notice or efforts to secure the best price possible, and no evidence being offered that the price obtained was a fair one, does not fix the legal measure of damages.[196]

In Cherry Valley Iron Works *v.* Florence River Iron Co.,[197] the contract was for the sale of ore to be delivered in seven monthly instalments, and contained a clause giving the vendor the right to "cancel" the contract in case of default. Plaintiff, the vendee, made three payments but did not call for the full amount of ore deliverable against them. For failure to continue the payments, defendants cancelled the contract. It was held that this did not amount to an absolute rescission restoring both parties to their original position, but gave the defendant the right to treat the contract as broken. The title of the undelivered ore remaining in the vendor, his measure of damages was the difference between the contract and market price taken at the average value during the months in which delivery was due. The measure of damages could not be fixed by a resale because the title had not passed and a sale of a quantity of ore equal to the amount undelivered could not be proved to fix the market value because it was made several months after the period fixed for delivery. This case seems to confirm the general view of rescission taken above.[198]

§ 756. Promise to give a bill or note.

* Where goods are sold to be paid for by note or bill payable at a future day, and the note or bill is not given, it is well settled in England and in this country, that the vendor cannot main-

7, 19 Am. St. Rep. 727, 13 S. W. 527; Texas & L. L. Co. *v.* Rose, 103 S. W. 444.

[195] Bigelow *v.* Legg, 102 N. Y. 652.

[196] Case *v.* Simonds, 7 N. Y. Supp. 253.

[197] 22 U. S. App. 655, 12 C. C. A. 306, 64 Fed. 569.

[198] *Acc.*, Hubbardston Lumber Co. *v.* Bates, 31 Mich. 573.

tain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement.[199] And in New York it has been held, that in such action he will be entitled to recover as damages the whole price of the goods, with the suggestion that there should be a rebate of interest during the stipulated period of credit; [200] the court, Bronson, J., saying: "The right of action is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired. The only difference between suing at one time or the other relates to the *form of the remedy*. In the one case, the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract, and the contract is no more broken after the credit expires than it was the moment that the note or bill was wrongfully withheld."

So in a case in Pennsylvania,[201] it was charged at the trial, that where goods are sold on credit, the vendee to give his note, which he refuses to do after the goods are delivered, suit may be brought for a breach of the contract before the expiration of the credit, in which case the measure of damages is the price of the goods. And the direction was held right.** But while the rule is usually stated in this form,[202] since the action is for

[199] Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 Bos. & Pull. 582; Hoskins *v.* Duperoy, 9 East, 498; Hutchinson *v.* Reid, 3 Camp. 329; Loring *v.* Gurney, 5 Pick. 15; Hunneman *v.* Inhabitants of Grafton, 10 Met. 454.

[200] Hanna *v.* Mills, 21 Wend. 90, 34 Am. Dec. 216. In the English cases nothing is said as to the amount which the plaintiff is entitled to recover. In the case of Hutchinson *v.* Reid, the plaintiff, though without discussion, was permitted to take a verdict for the price of the goods.

[201] Rinehart *v.* Olwine, 5 W. & S. 157.

[202] *Indiana:* Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79.

Maine: Thomas Mfg. Co. *v.* Watson, 85 Me. 300, 27 Atl. 176.

Massachusetts: Worthy *v.* Jones, 11 Gray, 168, 71 Am. Dec. 696.

North Dakota: Kelly *v.* Peirce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180.

Ohio: Stephenson *v.* Repp, 47 Oh. St. 551, 25 N. E. 803, 10 L. R. A. 620.

Pennsylvania: Girard *v.* Taggart, 5 S. & R. 19, 9 Am. Dec. 327.

Texas: Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Young *v.* Dalton, 83 Tex. 497, 18 S. W. 819.

Vermont: Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120.

The value of the property sold is of course immaterial: Bicknell *v.* Buck, 58 Ind. 354.

failure to give the note, a more accurate statement of the measure of damages is, that it is the face of the note with interest.[203]

This rule does not apply, of course, where the note to be given in payment for goods is that of a third party. So where the defendant agreed to pay for goods by the transfer of the note of a third party, secured by a second mortgage on certain property, and the third party was insolvent and the security worthless, only nominal damages were allowed upon breach.[204] This is on the same principle which restricts recovery for the value of a note to its actual value.[205]

§ 757. Consequential damages—Avoidable consequences.

In McCracken *v.* Webb [206] the plaintiff was allowed to recover the difference between the contract and market price of some hogs he had sold the defendant, *plus* the expense of keeping them from the time of defendant's refusal to accept to the date of resale.

The question of avoiding further loss by accepting an offer of the vendee to take the goods below the contract price, but above the market price, is one on which the authorities are not clear.[207] It has been held that the vendor need not accept such an offer.[208]

III.—Countermand before Time for Performance

§ 758. Effect of notice of countermand.

* An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance, by giving notice that he would not be ready to complete the agreement; and in these cases it has been insisted that the damages should be estimated as at the time of giving notice.** It has been held in some cases [209] that if upon

[203] *Connecticut:* Stoddard *v.* Mix, 14 Conn. 12, 24

Minnesota: Geiser Mfg. Co. *v.* Holzer, 110 Minn. 138, 124 N. W. 827.

Missouri: Aultman *v.* Daggs, 50 Mo. App. 280.

[204] Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369.

[205] Thompson *v.* Halbert, 40 Hun, 536; see § 256.

[206] 36 Ia. 551.

[207] See *supra*, § 741.

[208] Krebs Hop Co. *v.* Livesley (Ore.), 114 Pac. 944.

[209] *United States:* Rochm *v.* Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct.

a contract for the future delivery of goods the purchaser, before the time for delivery, gives notice that he will not accept the goods, this may be treated by the seller as a breach of contract and he may bring an action forthwith. In Massachusetts,[210] however, this doctrine of anticipatory breach was rejected, after careful consideration. Even when it is adopted the seller is not obliged to treat the notice as an immediate breach. He may wait until the time for delivery, and then, upon a tender of the goods and a refusal to accept them, bring suit. When in such a case the value of the goods has fallen between the notice and the time for delivery, the purchaser has in some cases claimed that damages should have been assessed as of the time of the notice, because the plaintiff should then have sold the goods in the market. A sufficient answer to this contention, however, is that the plaintiff had a right to regard the contract as still in force until the time fixed for performance, and on a familiar principle, that the plaintiff is not required to anticipate wrong, he could not be called upon to take any steps to avoid loss before breach by the defendant.[211]

The point was elaborately discussed by the Supreme Court of Illinois in the case of Kadish *v.* Young.[212] In that case appellees sold barley to appellants, to be delivered in January. The purchasers gave notice in December that they did not consider themselves bound by the contract, and would not comply with its terms. The sellers tendered the barley in January. It was held that the measure of damages was the diffence between the contract price and the market price at the time of tender. Scholfield, J., said: [213]

"Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract im-

780; Horst *v.* Rochm, 84 Fed. 565; Rochm *v.* Horst, 62 U. S. App. 520, 91 Fed. 345, 33 C. C. A. 550.

Illinois: Chamber of Commerce *v.* Sollitt, 43 Ill. 519.

Iowa: Barron *v.* Mullin, 46 Iowa, 235.

See Smoot's Case, 15 Wall. 36, 21 L. ed. 107; Dingley *v.* Oler, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850.

Ante, § 636c.

[210] Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384.

[211] § 224.

[212] 108 Ill. 170, 48 Am. Rep. 548.

[213] p. 183.

posed no duty upon appellees to make other contracts for January delivery, or to sell barley in December to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January."

The appellants cited the dictum of Keating, J., in the analogous case of Roper *v.* Johnson.[214] "If there had been any fall in the market, or any other circumstance calculated to diminish the loss, it would be for the defendant to show it;" and the words of Cockburn, C. J., in Frost *v.* Knight,[215] to the effect that the damages are subject to abatement in respect of any circumstances which would entitle him to a reduction. On this point the court said:[216]

"It is enough to observe in answer to this, that in both Frost *v.* Knight and Roper *v.* Johnson the notice that defendant would not comply with the contract was accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declaration of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose, for the theory in such case, as laid down by Cockburn, C. J., in Frost *v.* Knight, is: 'He keeps the contract alive for the benefit of the other party as

[214] L. R. 8 C. P. 167, 178.
[215] L. R. 7 Ex. 111, 113.
[216] p. 182.

well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.'"

* In an action of assumpsit [217] by plaintiff against defendant for not accepting a quantity of wheat which the plaintiff, early in January, 1839, contracted to sell to the defendant, to be delivered at Birmingham, as soon as vessels could be obtained for the carriage thereof, the defendant gave notice, on the 26th of January, that he would not accept the wheat if delivered—wheat having then fallen in price. It was at that time on its way to Birmingham, and on its arrival was offered to the defendant; but he refused to take it. On the trial, it was contended that the measure of damages was the difference between the contract price and the price on the 26th of January, when notice was given. But on argument, the Exchequer held that the true rule was the difference between the contract price and that on the day when it was offered at Birmingham; and they relied on the case of Leigh *v.* Patterson.[218]

So in another case,[219] which was an action of assumpsit for not accepting certain railway shares, the contract of sale was made on the 26th of August, 1840; on the 7th of September, the defendant refused to take them. On the 15th, the plaintiff resold the shares at a loss of £161 from the price agreed on; and the jury, under the charge of the judge, found a verdict for this amount. The defendant, on a motion for a new trial, insisted that the damages should have been calculated only to the 7th of September, when the defendant declared off. But Alderson, B., said: "The damages are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract; and it was for the jury to say what was such reasonable time."

So where a person had contracted for a certain quantity of oil, it was held that in an action for not accepting and paying for the oil, the proper measure of damages was the difference

[217] Phillpotts *v.* Evans, 5 M. & W. 475.

[218] 8 Taunt. 540.

[219] Stewart *v.* Cauty, 8 M. & W. 160.

between the price he had contracted to pay for the oil, and the market price at the time when the contract was broken.[220]** And where, by the terms of the contract, the goods were to be delivered at stated periods, but were not all delivered at the respective times, the purchaser not countermanding them, but requesting from time to time that the supply might be delayed, and finally refusing to accept any more; it was held, that damages might be given for the whole quantity remaining on hand, though consisting in part of quantities which, without being actually countermanded, had, by desire of the purchasers, been kept back at the time appointed for delivery; and that it was a proper direction to the jury to give such damages as would leave the plaintiffs in the same situation as if the defendants had fulfilled their contract.[221] Where, however, the contract calls for the manufacture and delivery of goods, the plaintiff, after notice that the defendant will not fulfil his contract, cannot go on manufacturing and upon tender recover the whole contract price.[222]

The same question may arise where the countermand is by the vendor. Thus in England,[223] in an action to recover damages for the breach of a contract by which the defendant had engaged to furnish the plaintiff a certain quantity of tallow in *all December*, at 65*s.* per cwt., the defendant had apprised the plaintiff, on the 1st of October, that he could not execute the contract, and he insisted that the difference between the contract price (65*s.*) and that of the 1st of October (71*s.*) was the rule of damages, on the ground that the plaintiff could, as soon as apprised that the contract would not be executed, have gone into the market and supplied himself at the then rates. The plaintiff, however, insisted that he was entitled to the difference between the contract price (65*s.*) and the price on the 31st December (81*s.*) that being the last day for the performance of the contract; and of that opinion was the court.

[220] Boorman *v.* Nash, 9 B. & C. 145.

[221] Cort *v.* Ambergate, N. & B. & E. J. Ry., 17 Q. B. 127.

[222] *Missouri:* Frederick *v.* Willoughby, 136 Mo. App. 244, 116 S. W. 1109.

North Carolina: Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

Texas: Tufts *v.* Lawrence, 77 Tex. 526, 19 Am. St. Rep. 772.

The general rule was laid down in Clark *v.* Marsiglia, 1 Den. 317, *ante*, § 636.

[223] Leigh *v.* Paterson, 8 Taunt. 540.

Park, J., said: "For anything that appears, the plaintiff never assented to rescind the contract, and the defendant might have delivered the tallow at any moment up to the 31st of December; and the price on that day should have regulated the verdict of the jury."

The result of these cases seems to be that a countermand by either party does not change the time at which damages are to be estimated, nor affect the general rule of damages. If the countermand is treated as a breach, the person so treating it acts thereafter under the rule of avoidable consequences; but if it is not treated as a breach, the rule of avoidable consequences can have no application before the time fixed for performance.

IV.—Breach of Warranty and Fraud

§ 759. Warranties.

* We come next to the subject of warranties. The contract of sale may be complied with on the part of the vendor, so far that delivery may have been made, but the article may still not satisfy the warranties, either express or implied, that have been made at the time of sale; and in this case the rule of damages is now to be investigated. We, for the present, assume that no fraud enters into the transaction, inasmuch as, in that case, we shall presently see different rules apply; and, moreover, it transfers the subject of compensation in a great degree to the discretion of the jury. It will be noticed that, in one branch of the question which we now proceed to examine, the rights and liabilities of the parties concerned are often identical with those of principal and surety; but reserving for separate inquiry that subject in its more extended form, we shall confine ourselves at present to the examination of warranties as contained in sales.

In cases of executory contracts, or contracts to deliver a specific article, if on delivery they prove not to satisfy the agreement, the plaintiff, as we have seen, is not bound to retain the articles, but he may return them within a reasonable time. So it was originally held in regard to chattels sold with warranty, that if they did not answer the agreement, the plaintiff had his election of two remedies: he might either re-

turn the article and recover the price paid; or he might sell the article and recover damages in an action on the warranty.[224]** To-day, however, the question of the buyer's right to rescind is one upon which there exists an irreconciliable conflict in the authorities.[225] Whatever the rule it can have no effect upon the measures of damages when the vendee sues for a breach of the warranty.

The uncertainty in which the whole law of warranties is involved has produced a variety of decisions as to the measure of relief. *It seems originally to have been held that the measure of damages in these cases was the difference between the price paid and the actual value; but it is now well settled that the rule is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty, the price paid being mere evidence of that value.** The conflict has doubtless been caused, in part, by the origin of the action of warranty. Originally based on tort, and differing from the ordinary action of deceit only in that there was no requirement of *scienter*, the nature of the action has changed, until it has now become customary to sue in assumpsit. If the action sounds in tort, as an original question at least, the damages would be estimated from the price; but if contract is the gist of the action, then the value of the article as represented should control.[226]

§ 760. Cases allowing difference between price and actual value.

*In an early case,[227] Mr. J. Buller, discussing the question whether an action for money had and received would lie on an executed contract, said: "In a late case before me, on a warranty of a pair of horses to Dr. Compton, that they were five years old, when in fact they turned out to be only four, I held that, *as the plaintiff had not rescinded the contract*, he could only recover damages; and then the question was, what was the difference *of the value* of horses of four or five years old."

[224] So held in the Special Court of Appeals of Virginia. Graham *v.* Bardin, 1 Patt. & H. 206.

[225] See Williston on Sales, § 608.

[226] See Williston on Sales, §§ 195 *et seq.*

[227] Towers *v.* Barrett, 1 T. R. 133.

In a subsequent case,[228] it was insisted that the plaintff should have returned the animal which had been warranted sound. But it was held by all the judges that neither such return nor notice of the unsoundness was necessary to enable the plaintiff to maintain his action for the damages sustained. In another case,[229] an action being brought on the warranty of a horse sold by the defendant to the plaintiff for £20; the warranty and the unsoundness being proved, the jury was directed that if the horse was kept, the verdict *ought to be for the difference between the value and the price paid.* The jury, however, contrary to this direction, found for the plaintiff £30 10*s.*; £20 for the horse, and 10 guineas for its keep. The defendant moved for a new trial; and the verdict was reduced to £20, the plaintiff undertaking to deliver back the horse, *free of any expense for its keep.***

In a few cases this rule, making the difference between the price paid and the value of the thing with the defect, has been laid down; [230] but in every jurisdiction the rule actually adopted is probably otherwise,[231] and these cases merely stand for a mistaken method of stating the sound rule.

[228] Fielder *v.* Starkin, 1 H. Bl. 17.

[229] Caswell *v.* Coare, 1 Taunt. 566.

[230] *Colorado:* Canon City Electric Light & Power Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. 1030; Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483.

Georgia: Badget *v.* Broughton, 1 Kelly, 591; Oxford Knitting Mills *v.* Wooldridge, 6 Ga. App. 301, 64 S. E. 1008.

Illinois: Morgan *v.* Ryerson, 20 Ill. 343; Crabtree *v.* Kile, 21 Ill. 180; Callendar I. & W. Co. *v.* Badger, 30 Ill. App. 314.

Maryland: Rice *v.* Forsyth, 41 Md. 389.

Michigan: Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674.

Mississippi: Hambrick *v.* Wilkins, 65 Miss. 631, 3 So. 67.

Missouri: Courtney *v.* Boswell, 65 Mo. 196; Anslyn *v.* Frank, 8 Mo. App. 242.

New York: Bedford *v.* Hol-Tan Co. 140 App. Div. 282, 128 N. Y. Supp. 78.

North Carolina: Kester *v.* Miller, 119 N. C. 475, 26 S. E. 115; Huyett-Smith Manuf. Co. *v.* Gray, 129 N. C. 438, 57 L. R. A. 198, 40 S. E. 178.

Oregon: Schumann *v.* Wager, 36 Ore. 65, 58 Pac. 770.

Pennsylvania: West Republic Mining Co. *v.* Jones, 108 Pa. 55, 65.

Texas: Anderson *v.* Duffield, 8 Tex. 237; Browne *v.* Allen, 53 Tex. Civ. App. 458, 116 S. W. 133.

Wisconsin: Park *v.* Richardson, 81 Wis. 399, 51 N. W. 572; Duecker *v.* Goeres, 104 Wis. 29, 80 N. W. 91.

England: Dingle *v.* Hare, 7 C. B. (N. S.) 145.

Canada: Mooers *v.* Gooderham, 14 Ont. 451.

[231] *Infra*, § 762.

§ 761. Between value as warranted and actual value.

The rule laid down in the preceding cases is not the law in most jurisdictions. In another English case,[232] in an action of assumpsit on a warranty of soundness in a horse, Lord Eldon spoke of the difference between the value of the article warranted and its actual value when sold, as the measure of damages; but the case did not turn on this point. Later, however, the precise subject was considered, and this rule finally adopted in another action brought for the breach of a warranty.[233] The plaintiff had bought a horse of the defendant for £45, warranted sound. The plaintiff has sold the horse with warranty to one Collins for £55; Collins returned the horse as unsound; and the plaintiff was obliged to repay the £55, and the animal was sold for £17 15*s*. The plaintiff claimed the difference between that sum and £45, the price paid; the expense of bringing the horse to London; his keep from the time of purchase to the sale as unsound; the £10 paid to Collins; £1 15*s*. for an examination at the veterinary college; and £1 15*s*. for opinion of counsel. Lord Denman, C. J., at the trial of the cause, said: "As the warranty and the unsoundness are admitted on the record, the only question is the amount of the damages. I am of opinion that the amount of damages is what the horse would *be worth if sound*, deducting the price it sold for after the discovery of the unsoundness; and I think the price at which it was sold to the plaintiff *is not conclusive as to its value*, though I think it very strong evidence. The fair value of the horse, if sound, is the measure of the damages; and the sum the plaintiff gave is only the evidence of the value." He refused to allow the £10 paid Collins, because there was no evidence that the horse was worth more than the plaintiff gave for it. The expense of bringing the horse to London, and of keeping him there also, was allowed. The court was moved for a new trial as to the £10 paid Collins; but they refused to disturb the verdict, saying that this claim in substance amounted to a claim of compensation for the loss of a good bargain, which could not be allowed as damages in such an action.[234]

[232] Curtis *v.* Hannay, 3 Esp. 82.

[233] Clare *v.* Maynard, 7 C. & P. 741.

[234] From the report of this case in the King's Bench, 6 A. & E. 519, it appears that a question arose as to the sufficiency of the declaration. The plain-

In a case in New York,[235] assumpsit was brought on a warranty that 120 barrels of flour were superfine flour, of good quality. The price paid was $9.50 per barrel; 60 barrels were defective. The defendant's counsel insisted that the measure of damages was the difference in value between the 60 barrels when sold and the value of superfine flour; but Willard, C. J., held at the trial that the plaintiffs were entitled to recover back the balance of the whole purchase money paid for the 60 barrels, with interest, crediting the amount realized by them from their sale at auction. On a motion for a new trial, Cowen, J., said: "Regarding this case as one of simple warranty without fraud, the measure of damages adopted at the trial was wrong. It should have been the difference between the *value of the sixty barrels* at the time of the sale considered as good superfine flour, and *the value of the inferior article sold.* The purchaser is entitled to have the article made equal in quality to what the warranty assured it to be." A new trial was granted.

The question has been still more distinctly decided by the same court in another case.[236] Gruman sued Cary on a warranty of soundness in a horse; the price paid was $90, and the breach was a disease of the eyes. The defendant insisted that the proper measure of damages was the difference between the real value of the horse, if sound, and his value with the defect complained of. The court below, however, decided that the measure of damages was the difference between the price paid and the value with the defect. A verdict being found in conformity to this charge, on exception and writ of error, it was said by the Supreme Court:

"The court below erred in laying down the rule of damages. The warranty cannot be satisfied, except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have *been worth* if the defect had not existed. . . . The rule, undoubtedly, is,

tiff insisted that the £10 should be allowed as expenses, if not as profit. But to cover this, the court said there was no adequate allegation. See also Cox *v.* Walker, in notes to this case.

See to the same effect:

Delaware: Burton *v.* Young, 5 Harr. 233.

New York: Muller *v.* Eno, 14 N. Y. 597.

[235] Voorhees *v.* Earl, 2 Hill, 288, 291.

[236] Cary *v.* Gruman, 4 Hill, 625, per Cowen, J.

that the agreed price is strong evidence of the actual value; and this should never be departed from unless it be clear that such value was more or less than the sum at which the parties fixed it. . . . It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less than the $90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than $80, the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth $100, the defendant would have been relieved from the payment of the ten dollars, because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty."

And a new trial was granted. Mr. Chancellor Kent [237] seems to prefer the rule as laid down in Curtis *v.* Hannay, cited above, on the ground of its being in harmony with the measure of damages on the covenant of warranty in the sale of land. But it is proper to notice that the doctrine settled is in analogy to the principle in another class of cases. It has been laid down as a general rule,[238] in regard to actions for non-performance of contracts (other than conveyances of lands), that the party ready to perform may recover damages to the extent of his injury, and that the price agreed to be paid on actual performance is not the measure of damages. This also seems the rule in other States where in the case of sale by sample, in an action on the implied representation or warranty, the measure is held to be the difference between the value of the articles delivered and the commodity sold.[239]

§ 761a. Discussion of principles.

These conflicting views may be satisfactorily explained if not reconciled by reference to the historical development of

[237] 2 Com. 480, in notes.

[238] Shannon *v.* Comstock, 21 Wend. 457.

[239] *Arkansas:* Murry *v.* Meredith, 25 Ark. 164.

New York: Roberts *v.* Carter, 28 Barb. 462.

Pennsylvania: Borrekins *v.* Bevan, 3 Rawle, 23.

the action for breach of warranty. It appears that this originated in the tort action of deceit, wherein it resembles the action of *assumpsit* itself. But though the action of *assumpsit* early assumed a distinct form, the action for breach of warranty retained its tort characteristics and only gradually were the strict requirements for an action of deceit dispensed with. At length, however, it became unnecessary to allege fraud, or that the seller knew his affirmations to be untrue. And it is the law to-day that though the action may be framed in tort no *scienter* need be alleged.[240] The remedy is, therefore, rather an action in the nature of deceit than a given action of deceit.

These changes in the tort action were doubtless affected by the invention of a new form of relief for breach of warranty,—an action framed in *assumpsit*. Here too time has wrought important modifications: the original requirement of an express promise [241] has been abolished and an affirmation which was in fact untrue will now sustain an action of *assumpsit*.[242] Thus though the plaintiff has these two alternative forms of relief the requirements for both are identical. As a question of logic one would expect the rule of damages to vary according to the form of action. Yet, when as here there is no substantial difference between the two actions it is natural that the distinction should be entirely obliterated if a good reason for so doing presents itself. Whatever the origin of the remedy for breach of warranty, it is certain that to most persons the term "warranty" imports a promise. A modification of legal technicalities to conform to ordinary business usage and understanding is by no means unusual in our law. Therefore it is not altogether surprising that the courts should ignore the form of the action for breach of warranty and in either case award the measure of damage regularly applied for breach of contract; that is, the difference between the value if as warranted and the actual value. This result is all the more acceptable if it be remembered that the action of *assumpsit* itself was founded partly, if not wholly, in tort, and only by a slow process assumed the nature of an action of covenant.[243]

[240] See Williston on Sales, §§ 195–197.
[241] Chandelor *v.* Lopus, Cro. Jac. 4.
[242] Williston on Sales, § 196.
[243] Ames, History of Assumpsit, 2 Harv. L. Rev. 1.

§ 762. Difference in values the general rule.

From these considerations it follows that whatever the rule may be when such actual fraud exists as would support an action of deceit, yet when this element is lacking or the action is for simple breach of an express or implied warranty, whether framed in tort or in contract, the better rule for measuring damages is the difference between the value which the thing sold would have had at the time of the sale, if it had been sound or corresponding to the warranty, and its actual value with the defect. And such is now the almost universally recognized rule.[244] The rule is the same whether the suit is brought by

[244] *United States:* Mack *v.* Sloteman, 21 Fed. 109; Newberry *v.* Bennett, 38 Fed. 308; Hudmon *v.* Cuyas, 57 Fed. 355; English *v.* Spokane Com. Co., 6 C. C. A. 416, 57 Fed. 451, 48 Fed. 196, 15 U. S. App. 218; Crane Co. *v.* Columbus Const. Co., 73 Fed. 984, 20 C. C. A. 233; Nashua Iron & Steel Co. *v.* Brush, 91 Fed. 213, 33 C. C. A. 456; Florence Oil & Refining Co. *v.* Farrar, 119 Fed. 150, 55 C. C. A. 656; McDonald *v.* Kansas City Bolt Co., 149 Fed. 360, 365, 79 C. C. A. 298; Meyer, Wilson & Co. *v.* Everett P. & P. Co., 184 Fed. 945.

Alabama: Willis *v.* Dudley, 10 Ala. 933; Marshall *v.* Wood, 16 Ala. 806; Worthy *v.* Patterson, 20 Ala. 172; Gingles *v.* Caldwell, 21 Ala. 444, 56 Am. Dec. 252; Davis *v.* Dickey, 23 Ala. 848; Foster *v.* Rodgers, 27 Ala. 602; Stoudenmeier *v.* Williamson, 29 Ala. 558; Herring *v.* Skaggs, 62 Ala. 180, 73 Ala. 446, 34 Am. Rep. 4.

Arkansas: Tatum *v.* Mohr, 21 Ark. 349; Murry *v.* Meredith, 25 Ark. 164; B. A. Stevens Co. *v.* Whalen, 95 Ark. 488, 129 S. W. 1081.

California: Hughes *v.* Bray, 60 Cal. 284; McLennan *v.* Ohmen, 75 Cal. 558; Woody *v.* Bennett, 88 Cal. 241, 26 Pac. 117; Silberhorn Co. *v.* Wheaton (Cal.), 51 Pac. 689; Erie City Iron Works *v.* Tatum, 82 Pac. 92, 1 Cal. App. 202; Germain Fruit Co. *v.* J. K. Armsby Co., 153 Cal. 585, 96 Pac. 319; Tibbals Oakum Co. *v.* Meigs (Cal. App.), 104 Pac. 844; Cal. Civ. Code, § 3313.

Colorado: Smith *v.* Mayer, 3 Colo. 207.

Connecticut: Murray *v.* Jennings, 42 Conn. 9, 19 Am. Rep. 527.

Delaware: Burton *v.* Young, 5 Harr. 233; Ellison *v.* Simons, 65 Atl. 591; Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978.

Florida: Merritt *v.* Wittich, 20 Fla. 27.

Georgia: Clark *v.* Neufville, 46 Ga. 261; Atkins *v.* Cobb, 56 Ga. 86; Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; Seaboard Lumber Co. *v.* Cornelia Planing Mill Co., 122 Ga. 370, 50 S. E. 121.

Illinois: Woodworth *v.* Woodburn, 20 Ill. 184; Strawn *v.* Cogswell, 28 Ill. 457; Wallace *v.* Wren, 32 Ill. 146; McClure *v.* Williams, 65 Ill. 390; Wilson *v.* King, 83 Ill. 232; Carpenter *v.* First Nat. Bank, 119 Ill. 352; Wheelock *v.* Berkely, 138 Ill. 153, 27 N. E. 942; Moore Furniture Co. *v.* Sloane, 166 Ill. 457, 46 N. E. 1108; C. W. Dooley & Co. *v.* Hasenwinkle Grain Co., 120 Ill. App. 43; Swartz *v.* Atchison, 120 Ill. App. 119; Miller *v.* Aldrich, 123 Ill. App. 464; Nave *v.* Gross, 146 Ill. App. 104.

Indiana: Overbay *v.* Lighty, 27 Ind. 27; Street *v.* Chapman, 29 Ind. 142, 92 Am. Dec. 345; Ferguson *v.* Hosier, 58

the vendee, or an assignee holding his right of action.[245] So the damages for breach of warranty that cows are with calf,

Ind. 438; Means *v.* Means, 88 Ind. 196; Hege *v.* Newsom, 96 Ind. 426; Blacker *v.* Slown, 114 Ind. 322; Johnson *v.* Culver, 116 Ind. 278; Crist *v.* Jacobi, 10 Ind. App. 688, 38 N. E. 543; Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834; Bushman *v.* Taylor, 2 Ind. App. 12, 28 N. E. 97; Green *v.* Witte, 5 Ind. App. 343, 32 N. E. 214; Elwood Planing Mill Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621.

Iowa: Likes *v.* Baer, 8 Ia. 368; Lacey *v.* Straughan, 11 Ia. 258; Boies *v.* Vincent, 24 Ia. 387; McCormick *v.* Vanatta, 43 Ia. 389; Jackson *v.* Mott, 76 Ia. 263; Short *v.* Mattesin, 81 Ia. 638, 47 N. W. 874; Douglass *v.* Moses, 89 Ia. 40, 56 N. W. 271, 48 Am. St. Rep. 353; Love *v.* Ross, 89 Ia. 400, 56 N. W. 528; Aultman *v.* Shelton, 90 Ia. 288, 57 N. W. 857; Eagle Iron Works *v.* Des Moines S. R. Co., 101 Ia. 289, 70 N. W. 193; Alpha Checkrower Co. *v.* Bradley, 105 Ia. 537, 75 N. W. 369; Davidson Bros. Co. *v.* Smith, 143 Ia. 124, 121 N. W. 503; Loxtercamp *v.* Lininger Implement Co., 147 Ia. 29, 125 N. W. 830.

Kansas: Weybrich *v.* Harris, 31 Kan. 92; Wheeler & W. M. Co. *v.* Thompson, 33 Kan. 491; Tufts *v.* Mabie, 7 Kan. App. 129, 53 Pac. 84; Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

Kentucky: Wood *v.* Wood, 1 Met. 512; Sharpe *v.* Bettis, 17 Ky. L. Rep. 673, 32 S. W. 395; Mosby *v.* Laruc, 143 Ky. 433, 136 S. W. 887; Leavell *v.* Coleman, 139 S. W. 1079.

Louisiana: Foster *v.* Baer, 7 La. Ann. 613; Slaughter *v.* M'Rae, 3 La. Ann. 455.

Maine: Moulton *v.* Scruton, 39 Me. 287; Ponce *v.* Smith, 84 Me. 266, 24 Atl. 854; Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

Maryland: Williamson *v.* Dillon, 1 H. & G. 444; Lane *v.* Lantz, 27 Md. 211; Horn *v.* Buck, 48 Md. 358; Central Trust Co. *v.* Arctic Ice Mach. Co., 77 Md. 202, 238, 26 Atl. 493; Sloan *v.* Alleghany Co., 91 Md. 501, 46 Atl. 1003.

Massachusetts: Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122; Door *v.* Fisher, 1 Cush. 271; Reggio *v.* Braggiotti, 7 Cush. 166; Tuttle *v.* Brown, 4 Gray, 457, 64 Am. Dec. 80; Whitmore *v.* South Boston Iron Co., 2 All. 52; Lothrop *v.* Otis, 7 All. 435; Grose *v.* Hennessey, 13 All. 389; Morse *v.* Brackett, 98 Mass. 205; Miller *v.* Smith, 112 Mass. 475; Case *v.* Stevens, 137 Mass. 551; Deutsch *v.* Pratt, 149 Mass. 415, 14 Am. St. Rep. 430, 21 N. E. 1072; Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507.

Michigan: White *v.* Brockway, 40 Mich. 209; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921; Henry *v.* Hobbs, 165 Mich. 183, 130 N. W. 616.

Minnesota: Converse *v.* Burrows, 2 Minn. 229; Minnesota H. W. *v.* Bonnallie, 29 Minn. 373; Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3; Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143; St. Anthony Lumber Co. *v.* Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274; Hansen *v.* Gaar, 63 Minn. 94, 65 N. W. 254; Miamisburg Twine & Cordage Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175; Benson *v.* Port Huron Co., 83 Minn. 321, 86 N. W. 327; Piano Manuf. Co. *v.* Richards, 86 Minn. 94, 90 N. W. 120.

Mississippi: Stillwell *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

Missouri: Smith *v.* Steinkamper, 16

[245] Sweet *v.* Bradley, 24 Barb. 549. Of course if the contract is rescinded by agreement and the property taken back the rule no longer applies. What the purchaser loses in such a case is the purchase price and this he is entitled to recover from the vendor. Lewis *v.* Doyle, 43 N. Y. Supp. 201.

are measured by the difference between their value in that condition and in the condition they in fact are in.[246] In the

Mo. 150; Stearns *v.* McCullough, 18 Mo. 411; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Thummel *v.* Dukes, 82 Mo. App. 53; June *v.* Falkinburg, 89 Mo. App. 563.

Montana: Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

Nebraska: Holmes *v.* Boydston, 1 Neb. 346; Birdsall *v.* Carter, 11 Neb. 143; Aultman *v.* Stout, 15 Neb. 586, 19 N. W. 464; Young *v.* Filley, 19 Neb. 543, 26 N. W. 256; Clark *v.* Deering, 29 Neb. 293, 45 N. W. 456; Burr *v.* Redhead, 52 Neb. 617, 72 N. W. 1058; McClatchey *v.* Anderson, 84 Neb. 783, 122 N. W. 67.

New Hampshire: Union Bank *v.* Blanchard, 65 N. H. 21, 18 Atl. 90.

New Jersey: Rutan *v.* Ludlam, 5 Dutch. 398; Perrine *v.* Serrell, 30 N. J. L. 454.

New York: Muller *v.* Eno, 14 N. Y. 597; Rust *v.* Eckler, 41 N. Y. 488; Leonard *v.* Fowler, 44 N. Y. 289, 4 Am. Rep. 675; Conor *v.* Dempsey, 49 N. Y. 665; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Hooper *v.* Story, 155 N. Y. 171, 49 N. E. 773; Isaacs *v.* Wannamaker, 189 N. Y. 122, 81 N. E. 763; Mathes *v.* McCarthy, 195 N. Y. 40, 87 N. E. 768; Comstock *v.* Hutchinson, 10 Barb. 211; Sharon *v.* Mosher, 17 Barb. 518; Brower *v.* Lewis, 19 Barb. 574; Roberts *v.* Carter, 28 Barb. 462; Richardson *v.* Mason, 53 Barb. 601; Wells *v.* Selwood, 61 Barb. 238; Kiernan *v.* Rocheleau, 6 Bosw. 148; Voorhees *v.* Earl, 2 Hill, 288, 38 Am. Dec. 588; Cary *v.* Gruman, 4 Hill, 625, 40 Am. Dec. 299; Rich *v.* Smith, 34 Hun, 136; Hunt *v.* Van Deusen, 42 Hun, 392; Sprout *v.* Newton, 48 Hun, 209; Fales *v.* McKeon, 2 Hilt. 53; Hoe *v.* Sanborne, 35 How. Pr. 197; Carman *v.* Trude, 25 How. Pr. 440; Messenger *v.* Pratt, 3 Lans. 234; Edwards *v.* Collson, 5 Lans. 324; Van Valkenburgh *v.* Evertson, 13 Wend. 76; Blanchard *v.* Ely, 21 Wend. 342, 34 Am. Dec. 250; Ahein *v.* O'Brien, 18 N. Y. Supp. 821; Bank of North Collins *v.* Cary Safe Co., 42 App. Div. 233, 59 N. Y. Supp. 643; Russell *v.* Corning Manf. Co., 49 App. Div. 610, 63 N. Y. Supp. 640; Steinhardt *v.* Phelps, 32 Misc. 730, 66 N. Y. Supp. 311; Ideal Wrench Co. *v.* Gavin Mach. Co., 72 N. Y. Supp. 662, 65 App. Div. 235; McQuade *v.* Newman, 88 N. Y. Supp. 363; Hano *v.* Simons, 92 N. Y. Supp. 337; McCarthy *v.* Ellers, 94 N. Y. Supp. 1109; Westinghouse C. K. & Co. *v.* Remington Salt Co., 116 App. Div. 123, 101 N. Y. Supp. 303; Ames *v.* Norwich Light Co., 122 App. Div. 319, 106 N. Y. Supp. 952; Sears *v.* Bailey, 58 Misc. 145, 110 N. Y. Supp. 467; Bodger *v.* Hills, 113 N. Y. Supp. 879; Mitchell *v.* Rowley, 63 Misc. 643, 118 N. Y. Supp. 751; Stratton *v.* Spaeth, 131 N. Y. Supp. 333.

North Carolina: Pritchard *v.* Fox, 4 Jones, 140; Hobbs *v.* Bland, 124 N. C. 284, 32 S. E. 683; Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627; Wrenn *v.* Morgan, 148 N. C. 101, 61 S. E. 641; Hardie-Tynes Mfg. Co. *v.* Eastern C. O. Co., 150 N. C. 150, 63 S. E. 676.

North Dakota: Aultman & Co. *v.* Ginn, 1 N. Dak. 402, 48 N. W. 336.

Ohio: Beresford *v.* McCune, 1 Cin. Sup. Ct. 50.

Oregon: Bump *v.* Cooper, 19 Ore. 81, 23 Pac. 806.

Pennsylvania: Cothers *v.* Keever, 4 Barr, 168; Seigworth *v.* Leffel, 76 Pa. 476; Freyman *v.* Knecht, 78 Pa. 141; Heines *v.* Kiehl, 154 Pa. 190, 25 Atl. 632; Joseph *v.* Richardson, 2 Pa. Super. Ct. 208; Shoe *v.* Maerky, 35 Pa. Super. Ct. 270.

[246] Richardson *v.* Mason, 53 Barb. 601.

English Common Pleas it was held that payment in advance did not affect the rule in such a case. The measure is the difference at the time of the delivery between the value of goods of the quality contracted for and that of those delivered, provided the goods can then be resold. Where there is a necessary or reasonable delay in the resale, the difference is to be computed on the day of the resale.[247] The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects, which are those which could not be discovered by simple inspection; and the purchaser may retain the thing sold, and have an action for the reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact. But such a part of the price only as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing after deducting its fruits, can be recovered.[248]

Where the goods were to be shipped abroad, which fact was known to the vendor, and the defect could not be dis-

South Carolina: Garrett *v.* Stuart, 1 McCord, 514; Rose *v.* Beatie, 2 N. & McC. 538; Verdier *v.* Trowell, 6 Rich. L. 166; Parker *v.* Pringle, 2 Strobh. 249.

South Dakota: Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; Cavanagh *v.* A. W. Stevens Co., 24 S. D. 349, 123 N. W. 681.

Tennessee: McGavock *v.* Wood, 1 Sneed, 181; Smith *v.* Cozart, 2 Head, 526; Allen *v.* Anderson, 3 Humph. 581, 39 Am. Dec. 197; Reese *v.* Miles, 99 Tenn. 398, 41 S. W. 1065.

Texas: Wright *v.* Davenport, 44 Tex. 164; Stark *v.* Alford, 49 Tex. 260; Routh *v.* Caron, 64 Tex. 289; Ford *v.* Oliphant (Tex. Civ. App.), 32 S. W. 437; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10; Danner *v.* Fort Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. 856; Ash *v.* Beck (Tex. Civ. App.), 68 S. W. 53.

Vermont: Woodward *v.* Thacher, 21 Vt. 580, 52 Am. Dec. 73; Mayer *v.* Dwinell, 29 Vt. 298; Penny *v.* Andrus, 41 Vt. 631.

Virginia: Thornton *v.* Thompson, 4 Gratt. 121; Eastern Ice Co. *v.* King, 86 Va. 97.

Washington: Abrahamson *v.* Cummings, 117 Pac. 709.

Wisconsin: Merrill *v.* Nightingale, 39 Wis. 247; Aultman & T. Co. *v.* Hetherington, 42 Wis. 622; Osborne *v.* McQueen, 67 Wis. 392; J. I. Case Plow Works *v.* Niles & Scott Co., 90 Wis. 590, 603, 63 N. W. 1013.

England: Jones *v.* Just, L. R. 3 Q. B. 197, 202; Clare *v.* Maynard, 7 C. & P. 743.

Canada: La Roche *v.* O'Hagan, 1 Ont. 300; Copeland *v.* Hamilton, 9 Manitoba, 143.

Australia: Spence *v.* Duffield, 1 Vict. 49.

[247] Loder *v.* Kekule, 3 C. B. (N. S.) 128.

[248] Bulkley *v.* Honold, 19 How. 390, 15 L. ed. 663.

covered till they reached their destination, it was held that the measure of damages was the difference between the marketable value of the article contracted for on the day of arrival and the actual value there,[249] which might be the price realized by a sale of the article received, together with expenses of sale.[250] And where the goods were sold abroad before the breach of warranty was discovered, and the plaintiff was compelled to take them back on account of the defect, and sold them again at a lower price, he was allowed to recover the difference between the prices realized at the two sales.[251]

Upon breach of contract of warranty of quality of tobacco sold, the purchaser gave notice to the seller that he would not accept it; the seller not receiving it back, the purchaser on notice sold it at auction. It was held that the price received at auction could be shown.[252] Danforth, J., said: "It was for the plaintiffs to show the market value of the tobacco delivered by the defendants. For that purpose a sale at auction was properly resorted to, and its result was some evidence of the fact in question, not conclusive, but quite satisfactory in the absence of explanation or testimony from the defendants."

It results from the general rule, that it is erroneous in an action on a note given for the price of a chattel for the court to charge the jury that, although they should find the covenant to have been broken, if at the time of the sale the chattel in its unsound state was worth the price for which it was sold, the defendant had sustained no damage.[253] Nor is the rule affected by proof that the purchaser afterwards sold the prop-

[249] Krasilnikoff *v.* Dundon, 8 Cal. App. 406, 97 Pac. 172.

[250] Camden C. O. Co. *v.* Schlens, 59 Md. 31, 43 Am. Rep. 537.

In Hudmon *v.* Cuyas, 57 Fed. 355, 6 C. C. A. 381, 13 U. S. App. 443, cotton was sold, under a warranty, to be delivered at Savannah, f. o. b. The case was decided on other grounds but the court said that in such a case delivery of an inferior quality having been made and the goods resold by the vendee and he having replaced himself in the market the cost of reselling and replacing might be a necessary and natural element of damages as much to be considered as difference in price. (Toulmin, J., *diss.*) *Cf.* Barker *v.* Marn, 5 Bush. 672, 96 Am. Dec. 373; Penn *v.* Smith, 93 Ala. 476, 9 So. 609.

[251] Rose *v.* Beatie, 2 N. & McC. 538.

[252] *New York:* Bach *v.* Levy, 101 N. Y. 511, 515.

England: Powell *v.* Horton, 2 Bing. N. C. 668.

[253] *Georgia:* Hook *v.* Stovall, 26 Ga. 704.

New York: Shields *v.* Pettie, 4 N. Y. 122.

erty for as much as and more than he paid for it.[254] Where the property at the time of the sale had no market value, and it is impossible to get at its real value at that time if it had been as warranted, the price paid may be taken to represent that value.[255] And it is sometimes said generally that the price at which the property was sold is evidence of its value at that time if as warranted.[256] Where, in an action for damages for a breach of warranty, the consideration given for the warranted article consisted in another article which was exchanged for it, evidence of the value of the exchanged property will be allowed, as tending to show what the value of the other would have

[254] *United States:* Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224.

Georgia: Atkins *v.* Cobb, 56 Ga. 86; Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657.

Illinois: Wheelock *v.* Berkely, 138 Ill. 153, 27 N. E. 942.

Massachusetts: Brown *v.* Bigelow, 10 All. 242.

Missouri: Missouri & I. C. Co. *v.* Consolidated C. Co., 127 Mo. App. 320, 105 S. W. 682.

Minnesota: Miamisburg Twine Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175.

New York: Hunt *v.* Van Deusen, 42 Hun, 392.

South Carolina: Ellison *v.* Johnson, 74 S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151.

South Dakota: Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

Wisconsin: J. I. Case Plow Works *v.* Niles & S. Co., 90 Wis. 590, 63 N. W. 1013.

The price received on resale may be taken as evidence of value.

Georgia: Berry *v.* Shannon, 98 Ga. 459, 25 S. E. 514, 58 Am. St. Rep. 314.

New York: Muller *v.* Eno, 14 N. Y. 597.

Vermont: Brock *v.* Clark, 60 Vt. 551, 15 Atl. 175.

See also *Missouri:* Joplin Water Co. *v.* Bathe, 41 Mo. App. 285.

New York: Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053; Sherman *v.* Billings, 90 Hun, 544.

[255] South C. & C. S. Ry. *v.* Gest, 34 Fed. 628; Meyer, Wilson & Co. *v.* Everett P. & P. Co., 184 Fed. 945.

[256] *Alabama:* Marshall *v.* Wood, 16 Ala. 812.

Georgia: Feagin *v.* Beaseley, 23 Ga. 17.

Minnesota: Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149.

Massachusetts: Day *v.* Mapes-Reeve Construction Co., 174 Mass. 412, 54 N. E. 878.

Minnesota: Miamisburg Twine Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175.

North Carolina: Williamson *v.* Conday, 3 Ired. 349.

Tennessee: Garr, Scott & Co. *v.* Young (Tenn.), 62 S. W. 631.

Texas: Ash *v.* Beck (Tex.), 68 S. W. 53; Gutta Percha & R. M. Co. *v.* Cleburne (Tex. Civ. App.), 107 S. W. 157.

Vermont: Houghton *v.* Carpenter, 40 Vt. 588.

Virginia: Thornton *v.* Thompson, 4 Gratt. 121.

Wisconsin: Case Plow Works *v.* Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013.

been if it had corresponded with the warranty.[257] The price realized on a second sale is admissible as one mode of determining the value.[258]

* Where fraud intervenes, as we shall presently see, the contract can be rescinded, the thing returned, and the price paid recovered back, or the party defrauded may stand to the bargain and recover damages for the fraud.[259] **

§ 762a. Recoupment.

When a breach of warranty has occurred and the buyer is sued for the price he may either counterclaim or recoup his damages. If he chooses the former remedy he may set off against the price the sum which under the law of the jurisdiction represents the measure of damages for a breach of warranty, *i. e.*, usually the difference in values. But the remedy of recoupment results quite differently. There the vendor's claim is in effect reduced to a quasi-contractual claim and the buyer need pay only the actual value of the article delivered.[260] This is of course equivalent to holding the measure of damages for a breach of warranty to be the difference between the price and the actual value. The terms counterclaim and recoupment are frequently, though erroneously, used interchangeably and the real distinction often unrecognized.

§ 763. Warranty of quantity or value.

* There is sometimes a warranty of quantity, either expressed or implied; and in that case the purchaser is entitled to have the article made equal in quantity to what the warranty de-

[257] Chaplin *v.* Warner, 23 Wis. 448. So in the analogous action for deceit. Fisk *v.* Hicks, 31 N. H. 535.

[258] *Alabama:* Milton *v.* Rowland, 11 Ala. 732; Foster *v.* Rodgers, 27 Ala. 602.

Massachusetts: Reggio *v.* Braggiotti, 7 Cush. 166.

North Carolina: Houston *v.* Starnes, 12 Ired. 313.

[259] *New York:* Voorhees *v.* Earl, 2 Hill, 288; Putman *v.* Wise, 1 Hill, 234, where the doctrine is considered at length in a learned note; Sharon *v.* Mosher, 17 Barb. 518.

England: Campbell *v.* Fleming, 1 A. & E. 40.

[260] *United States:* Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847.

California: Polhemus *v.* Heiman, 45 Cal. 573.

Connecticut: McAlpin *v.* Lee, 12 Conn. 129, 30 Am. Dec. 609.

District of Columbia: Fenton *v.* Braden, 2 Cr. C. C. 550.

Georgia: Watkins *v.* Paine, 57 Ga. 50; Berry *v.* Shannon, 98 Ga. 459, 25 S. E. 514.

Maryland: Birdsall Co. *v.* Palmer, 74 Md. 201, 21 Atl. 705.

clared it to be.[261] ** So, again, there may be a warranty that the thing sold shall, without reference to its intrinsic quality or value, be worth a certain price or have a certain value in the market within a specified time; and in that case the measure of damages is the difference between the warranted amount and the actual value.[262] So in a case in Massachusetts the defendant had sold the plaintiff twenty shares of the stock of an express company, with a warranty that it should be "worth $700 market value, within one year." The highest price reached by the stock during the year was $500. At the end of the year its market value was $330. The plaintiff insisted that the measure of damages was the difference between $330 and $700. But the defendant contended he was only liable to pay the difference between $500 and $700, and the court so held.[263] So where the defendant guaranteed to sell bonds for the plaintiff at a certain price and time, the measure of damages is the difference between the price received and that guaranteed.[264] In Vance *v.* McBurnett [265] where as part payment on an exchange of properties notes of a third party had been given under circumstances which amounted to a warranty of the notes and the makers were insolvent it was held that the measure of damages was the value placed upon the notes in the exchange.

§ 764. Avoidable consequences.

The rule of avoidable consequences applies here as elsewhere, and if the defect can be remedied, the cost of so doing is

Massachusetts: Bradley *v.* Rea, 14 Allen, 20; Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56.

New York: Judd *v.* Dennison, 10 Wend. 512.

Vermont: Brown *v.* Sayles, 27 Vt. 227; Mayer *v.* Dwinell, 29 Vt. 298.

Washington: Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

England: Mandel *v.* Steel, 8 M. & W. 858.

[261] *Georgia:* Parker *v.* Barlow, 93 Ga. 700, 21 S. E. 313.

New York: Voorhees *v.* Earl, 2 Hill, 288; Hargous *v.* Ablon, 3 Denio, 406.

Pennsylvania: Kinports *v.* Breon, 193 Pa. 309, 44 Atl. 436.

[262] *Georgia:* Florence *v.* Pattillo, 105 Ga. 577, 32 S. E. 642.

Massachusetts: Woodward *v.* Powers, 105 Mass. 108, 7 Am. Rep. 503.

New York: Titus *v.* Poole, 145 N. Y. 426, 40 N. E. 228.

Pennsylvania: Struthers *v.* Clark, 30 Pa. 210.

[263] Woodward *v.* Powers, 105 Mass. 108, 7 Am. Rep. 503.

[264] Plumb *v.* Campbell, 129 Ill. 101, 16 Am. St. Rep. 242, 18 N. E. 790.

[265] 21 S. E. 520.

the measure of damages.[266] One had sold another for the price of good pork, well packed in good barrels, a quantity of pork in barrels with a warranty that the barrels would not leak. After the barrels had been properly stowed by the vendee, he found that a part of them were leaky, and the brine had in consequence escaped. He, thereupon, under the advice of some experts, filled up the barrels with new brine, in good faith, intending and expecting thereby to preserve the pork; but the barrels continuing to leak, a portion of them were either wholly spoiled or deteriorated to an extent exceeding the balance due for the pork. The vendee did not notify the vendor of the leaking of the barrels, nor offer to return the imperilled pork, nor did he repack the pork in new barrels, which it appeared it was customary and necessary to do under such circumstances. Whether the vendee, in fact, knew of this custom or necessity did not appear. Both parties were free from fraud. In an action by the vendor for the unpaid balance of the purchase money, it was held that the vendee was entitled to no deduction on account of the loss of the pork, but only to what it would have cost to procure new barrels in lieu of the old ones and repack the pork therein.[267] Even where a plaintiff gives notice of a special object in purchasing an article, he cannot recover damages suffered by continuing to use it when he discovers its defects.[268] So the plaintiff is not allowed to recover the rental value of a distillery where he is prevented

[266] *United States:* Benjamin *v.* Hillard, 23 How. 149, 16 L. ed. 518; Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139; Vulcan Iron Works Co. *v.* Roquemore, 175 Fed. 11, 99 C. C. A. 77.

Alabama: Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

Arkansas: B. A. Stevens Co. *v.* Whalen, 95 Ark. 488, 129 S. W. 1081.

Illinois: Strawn *v.* Cogswell, 28 Ill. 457.

Kansas: Frick Co. *v.* Falk, 50 Kan. 644, 32 Pac. 360.

Louisiana: Leathers *v.* Sweeney, 41 La. Ann. 287.

Massachusetts: Whitehead & A. M. Co. *v.* Ryder, 139 Mass. 366.

Michigan: Kimball & A. M. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558.

Minnesota: Wyckoff *v.* Horan, 39 Minn. 429.

New York: Bates *v.* Fisk Brothers' Wagon Co., 50 App. Div. 38, 63 N. Y. Supp. 649.

Canada: M'Mullen *v.* Williams, 5 Ont. App. 518.

Only reasonable expenditures can be undertaken, having regard to the value of the warranted article. Tennis *v.* Gifford, 133 Ia. 372, 110 N. W. 586.

[267] Hitchcock *v.* Hunt, 28 Conn. 343.

[268] Draper *v.* Sweet, 66 Barb. 145.

from using it by a defect in a pump which he knew to be defective when he placed it in the well; he is confined to the difference in value per day between what the pump would have been worth had it been as warranted, and what it was actually worth.[269] The plaintiff should have protected himself from loss. On an action for breach of warranty of seeds which failed to grow, the court deducted from the amount of recovery the sum which the vendee might have made by renting the land or planting another crop, after he discovered that the seeds planted were worthless.[270]

§ 765. Consequential damages.

* The rights of the parties in a case of warranty are not, however, always presented in the simple form that we have just been considering. The vendee, in some instances, confiding in the warranty, is subjected to indirect or consequential loss. And the recovery of such consequential loss will depend on the general principles which we have heretofore examined.[271] So where a slave was sold with warranty of soundness, and two months afterwards received a gunshot wound and died, and it was proved that he had labored under a chronic affection of the lungs at the time of the sale, and but for that disease the wound would not have proved mortal; it was held, notwithstanding, that the vendor was liable only for the diminution of his value at the time of the sale in consequence of the disease, and not for the combined consequence of the wound and the disease.[272] ** In Randall *v.* Newson,[273] the plaintiff had bought of the defendant a pole for his carriage. In driving, the horses swerved and the pole broke short off at the carriage. The horses became restive and were injured. The court below had refused to allow damages for this injury. In Banc this was held to be error, the court saying: "We think that a ques-

[269] Nye *v.* Iowa C. A. Works, 51 Ia. 129, 33 Am. Rep. 121.

[270] Reiger *v.* Worth, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. Rep. 798.

[271] *Indiana:* Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834.

Missouri: Neil *v.* Cunningham Store Co., 149 Mo. App. 53, 130 S. W. 503.

Texas: Ford *v.* Oliphant (Tex. Civ. App.), 32 S. W. 437.

[272] Marshall *v.* Gantt, 15 Ala. 682.

[273] 2 Q. B. D. 102, 111. *Cf.* Woodward *v.* Miller, 119 Ga. 618, 46 S. E. 847.

tion should have been left to the jury similar to that which was left in Smith *v.* Green,[274] namely, whether the injury to the horses was or was not a natural consequence of the defect in the pole." In Zuller *v.* Rogers [275] it was held that for breach of warranty of the soundness of a canal-boat, the plaintiff was liable not only for the difference in value, but also for special damages sustained by reason of delay, loss of time, and other injury suffered unavoidably on the first trip before the defects were discovered.

In Leavitt *v.* Fiberloid Co.[276] the defendant sold material to be used by the plaintiff in a process which developed heat, and warranted that the material would not start a fire; but it did catch fire during the process. It was held that plaintiff could recover compensation for the damage caused by the fire. Where defendant sold fruit trees of a certain variety but delivered trees of an inferior variety, which could not be discovered until after several years' cultivation, the plaintiff was allowed the diminished value of the land by reason of the inferiority of the trees.[277] Where plaintiff was to take care of sheep for half the wool and half the lambs, defendant falsely representing that they were in good condition, and many died from disease, the measure of damages was held to be the cost of taking care of them and the value of the time spent, less the profits made under the contract.[278] Where a boiler, warranted sound, exploded and injured the plaintiff's mill, it was held that the rental value of the mill during the necessary repairs might be recovered.[279] Where white-lead had been spilled on the defendant's hay, and he had partially separated the poisoned hay from the rest, and wrongly supposed he had done so completely, and under this impression sold some of the remaining hay to the plaintiff, and the plaintiff's cow died from eating the hay, it was held that the defendant was liable, and that the rule of damages was the value of the cow.[280]

[274] 1 C. P. D. 92; cited *infra*, § 769.

[275] 7 Hun, 540.

[276] 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855.

[277] Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88.

[278] Parker *v.* Marquis, 64 Mo. 38.

[279] Sinker *v.* Kidder, 123 Ind. 528.

[280] French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440.

See to the same effect:

Oklahoma: Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389.

Texas: Houston Cotton Oil Co. *v.*

On the other hand, when the plaintiff, a retail grocer, purchased from the defendant a quantity of milk, and in ignorance of the fact that it was skimmed milk resold it to customers, and was arrested and fined ten dollars, it was held that he could recover only the difference between the value of skimmed milk and unskimmed milk.[281]

We proceed to consider some of the more common instances of the allowance of consequential damages.

§ 766. Upon warranty of fitness for a purpose.

Where an article is warranted fit for a particular purpose, the purchaser can recover the damages caused by an attempt to use it for that purpose.[282] This sometimes gives a larger measure of recovery than would be allowed under the ordinary rule. Where the chattel sold has different values, according to the use for which it is intended, the value which measures the damage is that which the vendor represented it to have with reference to the purpose to which he knew it was to be applied by the vendee. So where oxen purchased for work, and represented sound, proved unsound, and by reason of the unsoundness were worth ten dollars less for beef and twenty-five dollars for work, the larger sum was held to be the measure.[283] The plaintiff purchased from a druggist an article supposed to be Paris green for the known purpose of killing cotton worms. It was worthless and consequently the crop of cotton was destroyed by the worms. The measure of damages was held to be the value of the crop destroyed.[284] Where barrels were purchased for use in storing cider, as the seller

Trammell, 96 Tex. 598, 72 S. W. 244.

Ireland: Wilson *v.* Dunville, 6 L. R. Ir. 210.

[281] Sloggy *v.* Crescent Creamery Co., 72 Minn. 316, 75 N. W. 225.

[282] *California:* McLennan *v.* Ohmen, 75 Cal. 558; Fox *v.* Stockton C. H. & A. Works, 83 Cal. 333, 17 Am. Rep. 252.

Georgia: Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

Iowa: Swift & Co. *v.* Redhead, 147 Ia. 94, 122 N. W. 140.

In Leifer Mfg. Co. *v.* Gross, 93 Ark. 277, 124 S. W. 1039, the fact of consequential damage was not proved.

This rule has been held not to authorize a recovery of the value of goods stolen from a safe warranted burglar-proof. Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4. *Contra,* Deane *v.* Michigan Stove Co., 69 Ill. App. 106.

See *ante,* § 164*a*.

[283] Ladd *v.* Lord, 36 Vt. 194.

[284] Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

knew, and in consequence of defects the cider was lost, the vendor was held liable for the value of the cider,[285] and where oxen sold were warranted easily yoked by an old man, and were not, the measure of damages is the difference between the value of oxen as warranted and the value of the oxen sold.[286] So where a refrigerator was warranted to keep chickens frozen for market, the measure of damages was the diminished value of the refrigerator, and the value of chickens lost, reckoned at their value in the market at the time to which the refrigerator was warranted to keep them, less the expense of reaching market and selling.[287] Where coloring matter purchased for the purpose of coloring ice-cream by a manufacturer of that article proved to be poisonous, the purchaser was allowed to recover the value of the ice-cream lost through the use of the poisonous coloring matter, and also compensation for injury to business.[288]

Where a horse was warranted kind and gentle, and it was not so in fact, but ran away, the plaintiff recovered damages for personal injuries sustained thereby.[289]

In Dushane *v.* Benedict [290] the plaintiff sold to the defendant rags, which he represented to be clean rags though, as he knew, they had been infected with smallpox. The vendee's workmen caught the disease and he suffered damages, including sums paid by him to support disabled workmen, a loss resulting from running his mill short-handed, and a loss of trade. In an action for the price the vendee was held entitled to counterclaim and recover for all those items of damage.

Where steel sold proved to be of an inferior description to what it was warranted to be, the purchaser, having used the

[285] *Indiana:* Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730.

Michigan: Tatro *v.* Brower, 118 Mich. 615, 77 N. W. 274.

[286] Wing *v.* Chapman, 49 Vt. 33.

[287] Beeman *v.* Banta, 118 N. Y. 538, 16 Am. St. Rep. 779, 23 N. E. 887.

[288] Swain *v.* Schieffelin, 134 N. Y. 471, 18 L. R. A. 385, 31 N. E. 1025. Red umbrella covers were sold with a warranty that the color would not come off; the color did come off and stained the umbrellas; *held* that the damage to the umbrellas could be recovered. Jones *v.* Mayer, 38 N. Y. Supp. 801. *Cf.* Borradaile *v.* Bruntor, 8 Taunt. 535; *ante*, § 134.

[289] Bruce *v.* Fiss, 26 Misc. 472, 56 N. Y. Supp. 234, 47 App. Div. 273, 62 N. Y. Supp. 96.

See, however, Jones *v.* Ross, 98 Ala. 448, 13 So. 319.

[290] Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810.

steel in the manufacture of axes, was allowed to recover the difference between the value of these axes and that of axes made of the quality of steel this was described to be. The court stated that the reason of these decisions was that the plaintiff could not have discovered the defect before the axes were manufactured, and therefore could not replace himself till then.[291]

Where the heating apparatus installed by the defendant proved wholly inadequate to heat a greenhouse and the stock contained therein was damaged by the cold, the defendant was held liable for the diminution in value.[292] Where varnish was warranted fit to varnish wood mouldings, and upon being used for that purpose proved to be of an inferior sort, the measure of damages was held to be the difference in value of the mouldings varnished as they should have been and as they were.[293] In any case actual loss may be recovered. On breach of warranty of steel furnished for manufacturing into vises, the measure of damages is the cost of the labor and material wasted, with interest.[294] In case of warranty of steel springs sold to manufacture carriages, the purchaser may recover the expense of taking defective springs out of carriages manufactured and replacing them by new ones.[295]

Where worthless cement is sold to be used in plastering a house and in consequence thereof it becomes necessary to replaster, the cost of such work is recoverable from the vendor.[296] And if the plaster has fallen the injury resulting is an element of damages, to which may be added the rental value

[291] Parks *v.* Morris A. & T. Co., 54 N. Y. 586; *acc.*, Milburn *v.* Belloni, 39 N. Y. 53, 100 Am. Dec. 403.

[292] Laufer *v.* Boynton Furnace Co., 84 Hun, 311, 32 N. Y. Supp. 362. *Cf.* Fowler *v.* Pauly, 67 Mo. App. 632; Russell *v.* Corning Manuf. Co., 49 App. Div. 610, 63 N. Y. Supp. 640. In the latter case a physician's office became unfit for use because of improper heating: the measure of damages was held to be the rental value of the office.

[293] Moore *v.* King, 57 Hun, 224.

Cf. Dommerich *v.* Garfunkel, 28 Misc. 433, 58 N. Y. Supp. 1006 (cloth made into garments); Stranahan Co. *v.* Coit, 55 Oh. St. 398, 45 N. E. 634 (impure milk used in manufacturing certain products).

[294] Bagley *v.* Cleveland R. M. Co., 22 Blatch. 342.

[295] Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

[296] *Indiana:* Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557.

Massachusetts: Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507.

Nebraska: Omaha, etc., Co. *v.* Fay, 37 Neb. 68, 55 N. W. 211; Nye *v.* Snyder, 56 Neb. 754, 77 N. W. 118.

of the premises pending the repairing.[297] Where an animal is sold for breeding purposes, and warranted fit, damages for keeping it until its unfitness is discovered may be recovered.[298]

§ 767. Upon warranty of machines.

Under the foregoing head would properly come cases of warranty of machines. Where a machine turned out not to be what it was warranted, it was held that the plaintiffs could not recover for profits lost during the time which was required to put it in the condition it was warranted to be, since the more certain compensation is its rental value.[299] In an action for breach of a contract to construct and set up, within a specified time, engines on a steamboat of a stipulated quality and power; where it proved that the engines were not delivered within the time fixed by the contract, and did not conform to it, the measure of the plaintiff's damages was held to be the difference between the machinery furnished and that called for by the contract, together with expenses actually incurred by the plaintiff as a consequence of the breach, which would include the wages of the officers and crew while they remained idle during the delay in furnishing the machinery, and such reasonable further time as was consumed in testing and repairing it, or procuring other machinery instead, to which might be added interest.[300] Damages may also be recovered for materials consumed or injured by an attempted use of the

[297] Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Supp. 320.

[298] *California:* Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351.

Indiana: Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834.

Iowa: Steele *v.* M. E. Andrews & Sons, 144 Ia. 360, 121 N. W. 17.

[299] Booher *v.* Goldsborough, 44 Ind. 490.

[300] Fisk *v.* Tank *et al.*, 12 Wis. 276, 78 Am. Dec. 737.

See to the same effect:

California: Fox *v.* Stockton Harvester, etc., Works, 83 Cal. 333, 23 Pac. 295, 17 Am. St. Rep. 252.

Delaware: Wilmington Candy Co. *v.* Remington Mach. Co., 5 Pennew. 543, 65 Atl. 74.

Georgia: Aultman *v.* Mason, 83 Ga. 212, 9 S. E. 536.

Massachusetts: Whitehead *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

Nebraska: Burr *v.* Redhead, 52 Neb. 617, 72 N. W. 1058.

Wisconsin: Optenberg *v.* Skelton, 109 Wis. 241, 85 N. W. 356.

So in the case of expenses incurred by a street car company in constructing devices necessary for the installation of a storage battery system which proved to be useless. Accumulator Co. *v.* Dubuque St. R. R., 64 Fed. 70, 12 C. C. A. 37, 27 U. S. App. 364, 379;

machine before its inadequacy is known.[301] Where the plaintiff has ascertained that the materials are being injured, he must, of course, desist from attempting to use.[302] Where a steam boiler exploded while being properly used for the purpose for which it was intended, the seller is liable for injuries thus caused to adjacent property [303] and to employes.[304] McCormick *v.* Vanatta [305] was an action for breach of a warranty that a reaping and mowing machine would reap and rake small grain or flax, in all conditions, as well as it could be done by hand. The vendee claimed to recover for loss of part of his crop by a delay which was due to defects in the machine sold. The court refused to give such damages, holding that such a consequence was too remote, and saying that the true measure of damages was the difference in the value of the machine as it was and as it should have been. But if it had been within the contemplation of the parties at the time of the contract that it would be impracticable to procure another machine to do the work and save the crop, it has been intimated that the loss would be recoverable.[306] Where the warranted machine was bought for the manufacture of cotton-seed oil, the plaintiff may recover the deterioration in value of cotton seed bought to run in the machine.[307] For breach of warranty of a varnishing machine, the measure of damages is the difference between the value of the machine, had it corresponded with the warranty, and its actual value. This may be recouped in an action for the price.[308]

In all such cases when the losses on sub-contracts were

acc., O. H. Jewell Filter Co. *v.* Kirk, 102 Ill. App. 246.

[301] Wilmington Candy Co. *v.* Remington Mach. Co., 5 Pennew. 543, 65 Atl. 74.

[302] *Kansas:* Gale S. H. M. Co., *v.* Moore, 46 Kan. 324, 26 Pac. 703 (seeder).

Texas: Ellis *v.* Fips, 16 Tex. Civ. App. 82, 40 S. W. 524 (cotton gin).

[303] *Indiana:* Page *v.* Ford, 12 Ind. 46.

Pennsylvania: Erie City Iron Works *v.* Barber, 106 Pa. 125, 51 Am. Rep. 508.

[304] Boston W. H. & R. Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657, 86 Am. St. Rep. 478, 51 L. R. A. 781. *Acc.* Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433.

[305] 43 Ia. 389; *acc.*, Frohreich *v.* Gammon, 28 Minn. 476; Wilson *v.* Reedy, 32 Minn. 256; Smoots *v.* Foster, 16 Ohio C. Ct. 612.

[306] *Minnesota:* Frohreich *v.* Gammon, 28 Minn. 476.

Wisconsin: Aultman *v.* Case, 68 Wis. 612, 32 N. W. 772.

[307] Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

[308] Hooper *v.* Story, 155 N. Y. 171, 49 N. E. 773.

within the contemplation of the parties and capable of proof they may be recovered. Thus in Carroll-Porter Boiler Co. *v.* Columbus Machine Co.,[309] in which damages were claimed for breach of warranty of capacity of a machine, it was held error to reject proof of what it would have cost to do the work required by a dependant contract had the machine conformed to the warranty and what was the actual cost. Expenditures for advertising and losses incurred in the general business of the party injured were treated as too remote and uncertain.

The plaintiff may recover for freight paid on the machine,[310] and for the expense of setting up and testing it in the attempt to make it work.[311] In a strong enough case, recovery may be had for the loss of income from its use.[312]

§ 768. Of seeds.

We have already discussed the cases turning upon warranty of seeds, and shown how they illustrate the principles of consequential damages.[313] It is not necessary to do more than summarize the results here. Where seed is warranted to be of a certain quality and turns out to be of an inferior quality, the purchaser is not, *where the seed grows, and produces a crop*, confined to the difference between the price of seed of one quality and that of the other. He has been allowed to recover the difference between the value of a crop produced by the seed delivered and the value a crop produced by other seed would have had.[314] In the case of Randall *v.* Raper [315] the defendant

[309] 55 Fed. 451, 3 U. S. App. 631, 5 C. C. A. 190.

[310] *Arkansas:* W. T. Adams Mach. Co. *v.* Castleberry, 92 Ark. 310, 122 S. W. 998.

California: Luitweiler P. E. Co. *v.* Ukiah W. & I. Co. (Cal. App.), 116 Pac. 707.

Kentucky: Pennebaker Bros. *v.* Bell City Mfg. Co., 130 Ky. 592, 113 S. W. 829.

[311] *Arkansas:* W. T. Adams Mach. Co. *v.* Castleberry, 92 Ark. 310, 122 S. W. 998.

North Carolina: Waynesville Wood Mfg. Co. *v.* Berlin Mach. Works, 57 S. E. 455, 144 N. C. 689.

In Sturtevant Mill Co. *v.* Kingsland Brick Co. (N. J. L.), 70 Atl. 732, the expense for which the plaintiff claimed to recover was not one which he had a right to incur at the defendant's risk.

[312] Murray Co. *v.* Putman, 130 S. W. 631 (Tex. Civ. App.).

[313] § 191.

[314] *Illinois:* Phillips *v.* Vermillion, 91 Ill. App. 133.

Kentucky: Haycroft *v.* Walden, 14 Ky. L. Rep. 892.

England: Wagstaff *v.* Short Horn Dairy Co., Cab. & E. 324.

[315] E. B. & E. 84.

had sold the plaintiff some barley, warranting it to be "Chevalier seed barley." The plaintiff on the faith of that warranty had resold it with a similar one. The barley proved to be not "Chevalier seed barley," but of an inferior quality, in consequence of which the plaintiff's vendee obtained a poor crop. It was held that the plaintiff was entitled to recover the amount to which he had become liable to the vendee, although it was unliquidated as between him and his vendee. In Passinger *v.* Thorburn,[316] the last cited case was approved by the New York Court of Appeals, in a judgment affirming that of the court below.[317] The defendant sold cabbage seed, warranting that it would produce Bristol cabbages, and the plaintiff having sowed it in the anticipation of producing that crop, the warranty proved untrue. The damages were held to be the value of a crop such as should have been produced by the seed that year, had it conformed to the warranty, *deducting the expense of raising the crop*, and the value or product of the one in fact raised. The strong cases of Borradaile *v.* Brunton,[318] and Brown *v.* Edgington,[319] with other English cases to the same purport, are cited and approved; and the doctrine of Hadley *v.* Baxendale is applied to its full extent to the case of a breach of warranty. The rule in Passinger *v.* Thorburn, by which the expenses of raising the crop are deducted, has been followed in a Nebraska case.[320] But it is difficult to explain on principle. Such an expense is surely in the contemplation of the parties, if the seeds are sold for planting; and the same expense was actually incurred in raising the inferior crop. The true measure of damages is, therefore, to deduct from the value of the crop which should have been raised, only the value of the actual crop. Indeed, this is all that Passinger *v.* Thorburn squarely decided, for as was pointed out in a later New York decision,[321]

[316] 34 N. Y. 634, 90 Am. Dec. 753, See to the same effect:

Massachusetts: Edgar *v.* Joseph Breck & Sons Co., 172 Mass. 581, 52 N. E. 1083.

New Jersey: Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

New York: White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13.

Contra, in *Tennessee:* Hurley *v.* Buchi, 10 Lea, 346.

[317] 35 Barb. 17.

[318] 8 Taunt. 535.

[319] 2 M. & G. 279.

[320] Dunn *v.* Bushnell, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474.

[321] Van Wyck *v.* Allen, 69 N. Y. 61,

that case came upon an exception by the defendant to the court's charge. The deduction of the cost of raising the crop not being prejudicial to the defendant was not ground for reversal and the judgment was therefore rightly affirmed.

In the case of Flick *v.* Wetherbee,[322] the lessor of farming land having covenanted to supply seed, was held bound to supply good seed, and the above measure was applied to the lessee's damages by reason of a partial failure of the crop in consequence of the inferiority of the seed furnished. But, on the other hand, a more restricted rule has been adopted in the case of seeds *which do not in fact grow.* There the value of a possible crop is too conjectural. In such cases the damages should be the cost of the seed, the value of the labor in preparing the ground for it (less the general benefit to the land from such labor), the value of the labor in planting it, with interest on the several amounts.[323] *Where the seed grows, but does not produce a crop,* the rule is that the loss of crop is not too conjectural.[324] Where seed was sold as prime clover seed, but contained plantain, it was held that the purchaser could recover the difference in the value of the farm before the weed was sowed and after. The expense of uprooting and killing out the plantain is evidence to show the damage to the land.[325]

Another instance where the breach of warranty has a more permanent effect upon the value of the land is in the sale of fruit trees. Where trees of an inferior kind are delivered and planted by the buyer in ignorance of the facts, the measure of damages is the difference in the value of the premises with the inferior trees and the value if the trees had been as or-

25 Am. Rep. 136. But see Landreth *v.* Wycoff, 67 App. Div. 145, 73 N. Y. Supp. 388.

[322] 20 Wis. 392.

[323] *Connecticut:* Ferris *v.* Comstock, 33 Conn. 513.

Georgia: Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508.

Kansas: Shaw *v.* Smith, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681.

North Carolina: Reiger *v.* Worth, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. Rep. 798.

But see Page *v.* Pavey, 8 C. & P. 769.

[324] *Kentucky:* Crutcher *v.* Elliott, 13 Ky. L. Rep. 592.

New York: Schutt *v.* Baker, 9 Hun, 556.

Washington: Fuhrman *v.* Interior Warehouse Co. (Wash.), 116 Pac. 666.

[325] *New York:* Fox *v.* Everson, 27 Hun, 355; Bell *v.* Mills, 68 App. Div. 531, 74 N. Y. Supp. 224.

Canada: McMullan *v.* Free, 13 Ont. 57.

dered.[326] This difference is to be estimated at the time the trees first began to bear fruit, or whenever the breach of warranty was first discovered.[327]

§ 769. By communication of disease.

Where animals sold are warranted free from disease, loss through communication of disease to other animals of the purchaser may be recovered.[328] It is not necessary to the recovery of such damages to show that the vendor knew that the diseased animal was to be placed with others belonging to the plaintiff.[329] The defendant is presumed to anticipate that the animals he sells will be placed with others as a natural consequence of his act.[330] The expenses of nursing and curing other animals, which contract disease from those sold, may be recovered.[331]

§ 770. Upon a sub-contract.

No recovery can be had for delay in executing existing con-

[326] Heilmen *v.* Pruyn, 122 Mich. 301, 81 N. W. 97, 81 Am. St. Rep. 570; Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258.

[327] Shearer *v.* Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125.

That the statute of limitations runs from the day of the sale, see Allen *v.* Todd, 6 Lans. 222 (N. Y.). But compare Ashworth *v.* Wells, 14 T. L. Rep. 227 (orchid).

[328] *Delaware:* Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377.

Georgia: Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110.

Illinois: Wheeler *v.* Randall, 48 Ill. 182.

Iowa: Sherrod *v.* Langdon, 21 Ia. 518; Joy *v.* Bitzer, 77 Ia. 73; Mitchell *v.* Pinckney, 127 Ia. 696, 104 N. W. 286.

Kansas: Broquet *v.* Tripp, 36 Kan. 700.

Kentucky: Faris *v.* Lewis, 2 B. Mon. 375; Greenley *v.* Brooks, 13 Ky. L. Rep. 298.

Massachusetts: Bradley *v.* Rea, 14 All. 20

Minnesota: Marsh *v.* Webber, 16 Minn. 418.

Mississippi: McKee *v.* Jones, 67 Miss. 405, 7 So. 348.

Nebraska: Long *v.* Clapp, 15 Neb. 417.

New York: Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

Texas: Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658; Routh *v.* Caron, 64 Tex. 289.

Vermont: Packard *v.* Slack, 32 Vt. 9, 76 Am. Dec. 148.

Wisconsin: McCann *v.* Ullman, 109 Wis. 574, 579, 85 N. W. 493.

England: Mullett *v.* Mason, L. R. 1 C. P. 559; Smith *v.* Green, 1 C. P. D. 92; Knowles *v.* Nunns, 14 L. T. R. 592. See § 131.

[329] Packard *v.* Slack, 32 Vt. 9, 76 Am. Dec. 148.

[330] Sherrod *v.* Langdon, 21 Ia. 518.

[331] *Delaware:* Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377.

Georgia: Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110.

Nebraska: Long *v.* Clapp, 15 Neb. 417.

tracts on account of the breach of warranty where the fact of such contract was not made known to vendor.[332] Where pianos turned out to be defective, it was held that the plaintiff could not include transportation to and from sub-purchasers and hire of other pianos during time of repair.[333] But where it is known to the defendant that the property was bought to fill a contract, the plaintiff may recover the profits of the sub-contract.[334] But if the profits expected would have been extraordinarily large, the vendor is, in the absence of knowledge of this fact, liable only for ordinary profits.[335]

In a case in the Irish Exchequer [336] the plaintiff sued for breach of warranty on a sale of scrap iron. The defendant had notice at the time of purchase that the contract was made in order to enable the plaintiff to accept an offer for such iron from one Wright, in Philadelphia; after making the contract with the defendant, the plaintiff accepted Wright's offer, which was for a price found by the jury to be not an unusual advance over the purchasing price. It was held that the plaintiff could recover the difference between the actual value of the iron delivered by the defendant and the price he would have received on the sub-contract.

§ 771. Purchase for sale at a distance.

In a case [337] where the defendant had sold the plaintiff certain merchandise, called in the bill of parcels scarlet cuttings, intended for the China market, which turned out not to be so, Lord Ellenborough held that such a description implied a warranty that they were the article named, and charged that the plaintiff was entitled to recover such a sum as he would have received had the warranty been true with reference to the China market; the value to be recovered being the value which the plaintiff would have received had the defendant faithfully performed his contract. So where a quantity of

[332] Weybrick *v.* Harris, 31 Kan. 92.

[333] Snow *v.* Schomacker Mfg. Co., 69 Ala. 211.

[334] Carpenter *v.* First Nat. Bank, 119 Ill. 352; see § 162. But if goods to fill the sub-contract can be obtained elsewhere, such damages cannot be recovered. National Coke Co. *v.* Cincinnati G. C. C. & M. Co. (Mich.), 132 N. W. 88.

[335] Guetzkow *v.* Andrews, 92 Wis. 214, 66 N. W. 119.

[336] Hamilton *v.* Magill, 12 L. R. Ir. 186, 202.

[337] Bridge *v.* Wain, 1 Stark. 504.

pork, although contracted for delivery at one place, was known to the vendor to be intended for use by the vendee at another place, and when it had reached the latter proved to be damaged, the difference in value at the ultimate point was held to furnish the measure;[338] and in an action for breach of warranty, where the seller knew the articles were bought for a customer of the purchaser at Salt Lake City, it was said that the purchaser should recover the difference between the value of the articles at the place where the contract was made and the worth when delivered, *plus* the cost of transportation and the profits the plaintiff would have made by a resale.[339] But this rule was not followed in New York. The defendant sold plaintiff a quantity of apples, to be delivered at Barre, in New York. At the time of the sale it was agreed that the apples were to be "good ingrafted winter fruit," and it was understood that they were intended to be put up for the Canada market. They were accordingly delivered to the plaintiff at Barre, and he took them to Toronto, Canada, where the barrels were opened, and some of the apples found to be damaged. It was held, in an action for breach of warranty, that the true measure of damages was not the difference between the real value of the apples, as they proved to be, and the price of good merchantable fruit *in the Canada market*, deducting the price of transportation to that place, but the difference in value between a sound and the unsound article *at the place of delivery;* and that the plaintiff was not entitled to recover anything on the ground of a loss of profits. If the apples had been wholly lost in consequence of the fault of the vendor, the vendee might recover the expenses of transportation to the contemplated market, in addition to the price paid for the fruit. But he could in no event go beyond that, and recover anything on the ground of a loss of profits.[340] Under the general view now taken of the rule in Hadley *v.* Baxendale, this last case would hardly be followed.

§ 772. Expenses.

In a suit on the warranty of a slave, reasonable medical and

[338] Converse *v.* Prettyman, 2 Minn. 229.

[339] Thorne *v.* McVeagh, 75 Ill. 81.

[340] Lattin *v.* Davis, Hill & Denio Supp. 9.

other expenses, sustained by reason of the unsoundness warranted against, have been included in the damages,[341] with interest from the time of payment.[342] Nor is the right of recovery made to depend on the fact of payment. It is enough that they have been fairly incurred.[343] In Arkansas, on breach of warranty as to the soundness of a slave, the plaintiff was allowed to recover the expenses necessarily incurred in consequence of the unsoundness, but not interest on the value.[344] In cases of breach of warranty of soundness in the sale of animals, where the rule of compensation cannot be enlarged so as to include consequential damages, the jury should be instructed as to what evidence tends to show the difference in value between the animals sound and unsound, and what recoverable expenses have been seasonably, properly, and reasonably incurred in taking care of them and trying to cure them.[345] And in an action for breach of warranty of soundness of a slave who had died, the measure of damages was held to be the price paid and interest, and if the vendee offered to return the slave, and the offer was refused, the subsequent expenses of his keeping.[346] And on the same principle the plaintiff is entitled to recover the expenses of keeping an animal for such a reasonable time as may be necessary to sell him to the best advantage.[347] Where the vendor of machines knew they were purchased for resale and the vendee, before discovering the breach of warranty, sold them to customers who refused to

[341] *Alabama:* Hogan *v.* Thorington, 8 Port. 428; Kornegay *v.* White, 10 Ala. 255; Buford *v.* Gould, 35 Ala. 265; Stone *v.* Watson, 37 Ala. 279.

Georgia: Feagin *v.* Beasley, 23 Ga. 17.

New Jersey: Perrine *v.* Serrell, 30 N. J. L. 454.

[342] Roberts *v.* Fleming, 31 Ala. 683.

[343] Kelly *v.* Cunningham, 36 Ala. 78, 76 Am. Dec. 318.

[344] Tatum *v.* Mohr, 21 Ark. 349.

[345] *Arkansas:* Murry *v.* Meredith, 25 Ark. 164.

Iowa: Raeside *v.* Hamm, 87 Ia. 720, 54 N. W. 1079.

Vermont: Pinney *v.* Andrus, 41 Vt. 631.

Contra, Merrick *v.* Wiltse, 37 Minn. 41.

[346] Scranton *v.* Tilley, 16 Tex. 183.

In Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834 (Ind.), the vendee of a horse recovered the cost of keeping until he had had a reasonable time in which to ascertain that the horse was defective.

[347] *Kentucky:* Leavell *v.* Coleman, 139 S. W. 1079.

England: McKenzie *v.* Hancock, Ryan & Moody, 436; Chesterman *v.* Lamb, 2 A. & E. 129; Ellis *v.* Chinnock, 7 C. & P. 169; Clare *v.* Maynard, 7 C. & P. 741.

accept because of the defects, the vendee recovered the reasonable expense incurred in making such resale.[348]

§ 773. Litigation expenses.

* The vendor may be liable for the expenses of litigation incurred in consequence of his warranty. It seems when the chattel has been sold a second time by the vendee, relying on the original warranty, and he is prosecuted by the second vendee, and recovery had, the first vendor, if duly notified of the claim, and it is not unnecessarily resisted, is liable for the whole amount of the damages and costs recovered against the first vendee by the second vendee, as well as his costs of defence.[349] ** So in an action on the warranty of a horse, the defendant had sold the horse to the plaintiff with warranty, and the plaintiff had resold with warranty to one Dowling. Dowling sued the plaintiff, and recovered the price of the horse, with £88 costs. The plaintiff had given the defendant notice of Dowling's action. This action was brought for the price of the horse and the costs, and the plaintiff had a verdict for the whole amount. On a motion for a new trial, and to set aside the verdict as to the costs of Dowling's action, it was urged that, if the horse was unsound, the plaintiff had incurred this expense needlessly, and in his own wrong. But the rule was refused, the court saying that as the plaintiff received no directions from the defendant to give up the cause, the costs were a part of the damages which the plaintiff had sustained.[350]

[348] Puntency-Mitchell Manuf. Co. *v.* T. G. Northwall Co., 66 Neb. 5, 91 N. W. 863.

[349] *Arkansas:* Marlett *v.* Clary, 20 Ark. 251.

California: Erie City Iron Works *v.* Tatum, 1 Cal. App. 286, 82 Pac. 92.

New York: Carleton *v.* Lombard, 46 N. Y. Supp. 120.

England: Battley *v.* Faulkner, 3 B. & Ald. 288; Hammond *v.* Bussey, 20 Q. B. Div. 79.

But see Joseph *v.* Richardson, 2 Pa. Sup. Ct. 208.

Costs, but not counsel fees: Reggio *v.* Braggiotti, 7 Cush. 166; Jeter *v.* Glenn, 9 Rich. L. 374.

[350] Lewis *v.* Peake, 7 Taunt. 153; but it has been since held that notice is not conclusive. The same question was presented in Wrightup *v.* Chamberlain, 7 Scott, 598, and it being found that the plaintiff, before he defended the action brought against him, might have ascertained, by a reasonable examination of the horse, that it was not sound, the court said that the defence was a rash one, and the plaintiff not entitled to charge the defendant "with the costs of such improvident defence." And in Penley *v.* Watts, 7 M. & W. 601, 609, this case is spoken of as reconsidering that of Lewis *v.* Peake.

We shall see when we come to examine the subject of principal and surety in its more extended aspect, that it has been frequently held that the party, though holding a warranty, defends the suit at his peril, and that if it appear to have been unnecessarily defended, the expense will be charged on him. The only effect of notice is to shift the burden of proof. If no notice be given, the warrantee will be held to proof of the propriety of the litigation. If such notice has been given, the original warrantor will be obliged to prove that the expense was unnecessarily incurred.

Where the defendants had sold the plaintiff a picture, warranted to be painted by Claude, but in fact not painted by him; and the plaintiff sold it to a third party with like warranty; and the second vendee sued the plaintiff on the warranty, and recovered damages and costs,—it was held that if the sale was a *bona fide* sale, the plaintiff could recover the costs paid the sub-vendee, and all the costs of his own defence; nothing is said in the case of notice or the propriety of the litigation.[351]

§ 774. Warranty of title.

* The same questions which we are now considering are sometimes presented where the warranty, instead of referring to the quality of the article, is one of title. The result of the older English authorities is, that by the law of England there is no warranty of title in the actual contract of sale, any more than there is of quality; and so it was held in a case in the Court of Exchequer.[352] But according to the Roman law,[353] and in France,[354] and Scotland, and generally in the United States, there is always an implied contract that the vendor has a right to dispose of the subject which he sells. In an action (on the case),[355] on the warranty of title implied in the sale of a horse, Blasdale bought the horse of Babcock, but was afterwards sued by Snow in trover for the animal; he gave notice to the defendant of the suit; and judgment was obtained against him for the value of the horse, with costs. It was held at the

[351] Pennell *v.* Woodburn, 7 C. & P. 117.

[352] Morley *v.* Attenborough, 3 Ex. 500, where the English cases are examined.

[353] Domat, book i, tit. 2, § 2, art. 3.

[354] Code Civil, ch. 4, § 1, art. 1603.

[355] Blasdale *v.* Babcock, 1 Johns. 517.

trial that the judgment was strong but not conclusive evidence of Snow's title; and that, if not rebutted, the measure of damages was the amount of the recovery against Blasdale in the other action (verdict and costs). And this was held right by the Supreme Court of New York.

In an action (of assumpsit) under somewhat different circumstances,[356] the plaintiff bought a horse of the defendant for $55 cash, and another horse valued at $85, in all $140; the plaintiff sold the horse to one Milligan, and shortly after, one Gordon replevied the horse of Milligan, and recovered judgment, $72.32 for damages, and $33.95 costs, which were paid by Milligan; Milligan also paid the costs of his own defence. The plaintiff then settled with Milligan amicably, and claimed of the defendant the original amount paid by him, and also the damages and costs paid by Milligan and repaid by the plaintiff to him. The cause was referred; and the defendant insisted that the measure of damages was the price of the horse, with the interest thereof, deducting his services since the sale to the plaintiff, and that the plaintiff was not entitled to recover the costs and expenses in the replevin suit of Gordon. On a motion to set aside the report, the court held that the referees should have allowed the plaintiff the price paid by the defendant for the horse, and interest, together with the costs which he became liable to pay Gordon, in the suit brought to establish his title; and the expenses paid by Milligan in his own defence were disallowed.[357] It may be proper to observe that the court here appears to have lost sight of the principle laid down in the cases already cited, that the recovery should be estimated, not by the price paid, but by the real value. If this rule is true in regard to a warranty of soundness, there seems no reason why it should not apply to a warranty of title.**

The warranty of title is often construed by courts as equivalent to a warranty of quiet enjoyment, usually given in sales of realty. Under such a view no cause of action accrues, until

[356] Armstrong *v.* Percy, 5 Wend. 535.

[357] Defendant sold to plaintiff a patent right for two counties, but the title failed as to one; the measure of damages was held to be that proportion of the purchase price which the value of that part of the right to which the title failed bore to the whole value. Moorehead *v.* Davis, 92 Ind. 303.

the vendee has been dispossessed by the true owner.[358] And it would seem that the damages would be measured by the value of the chattel at that time.

The general rule is that the measure of damages for breach of a warranty of title to a chattel is the value of the chattel [359] at the time of the purchase, with interest, and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment.[360] Many cases, however, lay down the rule that the measure of damages is not the value but the price paid for the goods.[361] Such cases

[358] *California:* Gross *v.* Kierski, 41 Cal. 111.

Kentucky: Patrick *v.* Swinney, 5 Bush, 421, 96 Am. Dec. 360.

Massachusetts: Bennett *v.* Bartlett, 6 Cush. 225 (but see Grose *v.* Hennessee, 13 All. 389).

New York: Burt *v.* Dewey, 40 N. Y. 283, 100 Am. Dec. 482; McGiffin *v.* Baird, 62 N. Y. 329, 331.

North Carolina: Hodges *v.* Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545, 32 Am. St. Rep. 782.

See Wanser *v.* Messler, 29 N. J. L. 256; Lines *v.* Smith, 4 Fla. 47.

Where there was actual fraud the vendee may successfully resist an action for the price though he is still in undisturbed possession. Sweetman *v.* Prince, 62 Barb. 256. And see Sumner *v.* Gray, 4 Ark. 467; Brown *v.* Smith, 5 How. (Miss.) 387; Richardson *v.* McFadden, 13 Tex. 278.

See Williston on Sales, § 221.

[359] *Alabama:* Rowland *v.* Shelton, 25 Ala. 217.

Illinois: Linton *v.* Porter, 31 Ill. 107.

Maryland: Myers *v.* Smith, 27 Md. 91.

Massachusetts: Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57.

Minnesota: Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

Missouri: Johnson *v.* Blanks, 34 Mo. 255.

Canada: Confederation Life Assoc. *v.* Labatt, 27 Ont. App. 321.

[360] *Illinois:* Scaling *v.* Knollin, 94 Ill. App. 443.

Maine: Eldridge *v.* Wadleigh, 12 Me. 371; Pierce *v.* Banton, 98 Me. 553, 57 Atl. 889.

New York: Armstrong *v.* Percy, 5 Wend. 535; Schmumacher *v.* Kennedy, 88 N. Y. Supp. 943.

South Carolina: Davis *v.* Wilborne, 1 Hill, 27, 26 Am. Dec. 154 (costs in defending suit brought by sub-vendee).

Tennessee: Brown *v.* Woods, 3 Cold. 182.

Cf. Noel *v.* Wheatly, 30 Miss. 181.

[361] *California:* Jeffers *v.* Easton, 113 Cal. 345, 45 Pac. 680.

Illinois: Scaling *v.* Knollin, 94 Ill. App. 443.

Kentucky: Ellis *v.* Gosney, 7 J. J. Marsh. 109.

Mississippi: Noel *v.* Wheatly, 30 Miss. 180.

New York: Atkins *v.* Hosley, 3 Thomp. & C. 322; Armstrong *v.* Percy, 5 Wend. 535.

Oregon: Arthur *v.* Moss, 1 Ore. 193.

South Carolina: Glover *v.* Hutson, 2 M'Mullan, 109; Ware *v.* Weathnall, 2 McCord, 413.

Tennessee: Crittenden *v.* Posey, 1 Head. 311.

Texas: Goss *v.* Dysant, 31 Tex. 186.

England: Eicholz *v.* Bannister, 17 C. B. (N. S.) 708; Raphel *v.* Burt, Cab. & Ell. 325.

Canada: Peuchen *v.* Imperial Bank, 20 Ont. 325.

may be explained on a variety of grounds. The rule is quite consistent with the tort-origin of the action for breach of warranty [362] and this is perhaps the only theoretical justification. On the other hand, even when the measure of damages usually applied in actions of assumpsit is followed, the price paid is very good evidence of the actual value of the chattel. It may even be treated as *prima facie* evidence. Finally, the courts may have confused the right to sue for breach of warranty with his right to rescind. For the vendee may disaffirm the contract and recover the consideration paid, though that is greater than the value of the property.[363] Where a steamboat sold was warranted free from liens, but was subsequently seized under a lien, and while in custody was burned, the purchaser has been allowed to recover only the amount of the lien and the cost of disputing it, the destruction of the boat being considered too remote a consequence.[364] Where there is not a total failure of title, but only an incumbrance, the measure of damages is the amount the vendee was compelled to pay to protect his possession.[365]

§ 775. Warranty of indorsements.

It has been held in Massachusetts,[366] that where a warranty is given that the indorsements on a note are genuine, and they prove to be forged, the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be.[367]

It has been decided in the same State, in an action of assumpsit, brought on a warranty of an indorsement as genuine, that the plaintiff was entitled to recover, as part of his damages, the

[362] See § 761*a*.

In Tennessee the courts have applied to actions on covenants for the failure of title to chattels the same measure as in the case of land, which in that State is the price paid and interest. Crittenden *v.* Posey, 1 Head, 311; and see Ware *v.* Weathnall, 2 McCord, 413.

[363] Wilkinson *v.* Ferree, 24 Pa. 190. See Williston on Sales, § 615.

[364] Harper *v.* Dotson, 43 Ia. 232, 22 Am. Rep. 245.

[365] Sargent *v.* Currier, 49 N. H. 310, 6 Am. Rep. 524.

So where the goods were subject to a patent, plaintiff could recover the amount necessarily paid the patentee for the right to use them. National M. E. B. Co. *v.* Gotham, 125 App. Div. 101, 109 N. Y. Supp. 450.

[366] Coolidge *v.* Brigham, 1 Met. 547.

[367] Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682. But see Aldrich *v.* Jackson, 5 R. I. 218.

costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced the suit in good faith, not knowing that the signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature; and the court held that the rule established in actions for a breach of the covenant of warranty in the conveyance of real estate, must govern the case.[368]

In Wisconsin, the measure of damages on breach of an implied warranty of an indorsement has been held to be the difference between the values of the note with and without the indorsement, and the costs and reasonable expenses of suing the other indorsers, the question of notice not being raised. The defendant was allowed to show the insolvency of the indorser.[369]

§ 776. That a certain sum is due.

In an action for breach of such a warranty, the warrantee can recover what the note of such a maker would be worth, *e. g.*, what a judgment against him would be worth. *Prima facie,* the amount recoverable would be the whole amount due on the note at the time the suit was brought.[370] So where the assignor of a judgment covenanted that there was due a certain sum, and that he would not discharge the judgment, it being proved that he had previously discharged one judgment debtor, the plaintiff was allowed to recover the difference between the actual value of the judgment and the value it would have had if the debtor had not been discharged, and this although the

[368] Coolidge *v.* Brigham, 5 Met. 68; Swett *v.* Patrick, 12 Me. 9. In Alabama, it is held that, in an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment against the vendee, at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems that such judgment is admissible to prove the amount of damages recovered, and is conclusive of the validity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. And the measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. Salle *v.* Light, 4 Ala. 700.

[369] Giffert *v.* West, 33 Wis. 617.

[370] *United States:* Head *v.* Green, 5 Biss. 311.

Minnesota: Book Co. *v.* Maybell, 86 Minn. 241, 90 N. W. 392.

price paid was only ten per cent of the amount of the judgment.[371] Where at the defendant's request suit had been brought without success by the plaintiff, he may recover the costs of that suit.[372]

§ 777. Fraud in sale of chattels.

In a case in New York,[373] the Court of Appeals said: "The measure of damages in an action upon a warranty, and for fraud in the sale of personal property, are the same. In either case they are determined by the difference in value between the article sold, and what it should be according to the warranty or representation," and this has usually been stated as a general rule.[374] So where the defendant sold to the plaintiff

[371] Bennett *v.* Buchan, 61 N. Y. 222, 19 Am. Rep. 272.

[372] Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93.

[373] Whitney *v.* Allaire, 1 N. Y. 305, 312.

[374] *Arkansas:* Morton *v.* Scull, 23 Ark. 289; Thompson *v.* Bertrand, 23 Ark. 730; May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064.

California: Spreckels *v.* Gorrill, 152 Cal. 383, 92 Pac. 1011; Neher *v.* Hansen, 12 Cal. App. 370, 107 Pac. 565.

Colorado: Herfort *v.* Cramer, 7 Colo. 483.

Florida: Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia: Millirons *v.* Dillon, 100 Ga. 565, 28 S. E. 385.

Illinois: Winslow *v.* Newlan, 45 Ill. 145; Cox *v.* Gerkin, 38 Ill. App. 340; Chrystal *v.* Leval, 144 Ill. App. 533.

Indiana: McAvoy *v.* Wright, 25 Ind. 22, 87 Am. Dec. 346; Bowman *v.* Clemmer, 50 Ind. 10; Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Brier *v.* Mankey (Ind. App.), 93 N. E. 672.

Iowa: Likes *v.* Baer, 8 Ia. 368; Boddy *v.* Henry, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769; Warfield *v.* Clark, 118 Ia. 69, 91 N. W. 833.

Kentucky: Exchange Bank *v.* Gaitskill, 37 S. W. 160, 18 Ky. L. Rep. 532; Drake *v.* Holbrook, 92 S. W. 297, 28 Ky. L. R. 1319; Long *v.* Douthitt, 134 S. W. 453 (but see Crews *v.* Dabney, 1 Litt. 278; Singleton *v.* Kennedy, 9 B. Mon. 222; Ligon *v.* Minton, 125 S. W. 304).

Massachusetts: Morse *v.* Hutchins, 102 Mass. 439; Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084; Honsucle *v.* Ruffin, 172 Mass. 420, 52 N. E. 538.

Michigan: Page *v.* Mills, 37 Mich. 415; Jackson *v.* Collins, 39 Mich. 557; Totten *v.* Burhams, 91 Mich. 495, 51 N. W. 1119, 30 Am. St. Rep. 492; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921, 34 Am. St. Rep. 324; Smith *v.* Werkheiser, 152 Mich. 177, 115 N. W. 964, 15 L. R. A. (N. S.) 1092. (See Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.)

Missouri: Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Ryan *v.* Miller (Mo. App.), 139 S. W. 128.

Nebraska: Young *v.* Filley, 19 Neb. 543; Woolman *v.* Wirtebaugh, 22 Neb. 490, 35 N. W. 216.

New Hampshire: Fisk *v.* Hicks, 31 N. H. 535; Page *v.* Parker, 40 N. H. 47, 80 Am. Dec. 172, 43 N. H. 363; Carr *v.* Moore, 41 N. H. 131; Noyes *v.* Blodgett, 58 N. H. 502.

a bond and mortgage, which afterwards proved voidable, at less than the face value, and the plaintiff's recovery on the bond was restricted to the amount he had paid, he was allowed to recover of the defendant the difference between the face of the bond and the amount he had recovered upon the bond.[375] In Grissler *v.* Powers [376] the court said:

"The estoppel created by a false representation acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented was true, and when the representation is made on the sale of a chattel or security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if the purchaser would receive a benefit beyond that if the facts had been as represented."

Where the defendant sold to the plaintiff slaves in which, as it proved, the vendor had only a life estate, the same general rule was followed, but it was held that what occurred between the sale and the trial should be considered, such as the death

New York: Hubbell *v.* Meigs, 50 N. Y. 480; Miller *v.* Barber, 66 N. Y. 558; Krumm *v.* Brach, 96 N. Y. 398; Vail *v.* Reynolds, 118 N. Y. 297, 23 N. E. 301; Yeomans *v.* Bell, 151 N. Y. 230, 45 N. E. 552; Graves *v.* Spier, 58 Barb. 349; Mason *v.* Raplee, 66 Barb. 180; Wyeth *v.* Morris, 13 Hun, 338; Benedict *v.* Guardian Trust Co., 91 App. Div. 103, 86 N. Y. Supp. 370; Davidge *v.* Guardian Trust Co., 136 App. Div. 78, 120 N. Y. Supp. 628; Spotten *v.* De Freest, 140 App. Div. 792, 125 N. Y. Supp. 497.

North Carolina: Small *v.* Pool, 30 N. C. 47; Lunn *v.* Shermer, 93 N. C. 164; Robertson *v.* Halton, 72 S. E. 316.

North Dakota: Fargo Gas & Coke Co. *v.* Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; Beare *v.* Wright, 14 N. D. 26, 103 N. W. 632.

Ohio: Norton *v.* Parker, 17 Ohio Cir. Ct. 714, 8 Ohio Cir. Dec. 572.

Pennsylvania: Stetson *v.* Crocksey, 52 Pa. 230.

South Dakota: McCabe *v.* Desnoyers, 20 S. Dak. 581, 108 N. W. 341.

Tennessee: Hogg *v.* Cardwell, 4 Sneed, 151.

Texas: Davenport *v.* Anderson, 28 S. W. 922 (Tex. Civ. App.); Ford *v.* Oliphant, 32 S. W. 437 (Tex. Civ. App.); Carson *v.* Houssels, 51 S. W. 290 (Tex. Civ. App.); Pitman *v.* Self, 127 S. W. 907 (Tex. Civ. App.); Reed *v.* Holloway, 127 S. W. 1189 (Tex. Civ. App.). See, however, Wimple *v.* Patterson (Tex. Civ. App.), 117 S. W. 1034; George *v.* Hesse, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772.

Vermont: Woodward *v.* Thacher, 21 Vt. 580, 52 Am. Dec. 73.

Wisconsin: Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179, 46 Am. St. Rep. 834.

[375] Grissler *v.* Powers, 81 N. Y. 57; Miller *v.* Zeimer, 12 Daly, 126.

[376] 81 N. Y. 57, 61, 37 Am. Rep. 475.

of a slave, and an improvement in the health and probable length of life of the defendant.[377]

* So, where case was brought for fraud and deceit in the sale of a vessel, which was represented to be British, whereas in fact she was Spanish, Story, J., before whom the cause was tried, held the rule of damages to be the difference between the value of the vessel if she had been what she was represented to be, and her actual value, together with such part of the costs of repairs laid out on her, on faith of the false representations, as the jury should see fit to allow.[378]

So, again, where fraud has been practiced in a sale, as of a horse, the measure of damages was held to be, as in an action for the breach of warranty, the difference between the value of the article sold and the value of such an article as it was represented to be, even if, at the time of the sale, the property was fairly worth the price paid.[379] **

The contract price is frequently taken as the value of the property represented,[380] and in the absence of other evidence of value, it is properly so taken. If the plaintiff rescinds the contract on account of the fraud, upon returning the consideration he may recover the purchase money and interest.[381]

§ 778. Smith v. Bolles.

The Supreme Court of the United States, however, has refused to follow this well-established rule. In an action of tort for fraud in the sale of stock, it was held that the measure of damages was not the same as upon breach of warranty, but was compensation for the injury done by the fraud, that is, the purchase money less the actual value of the stock.[382] Fuller, C. J., said:

"The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been

[377] Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195.

[378] Sherwood *v.* Sutton, 5 Mason, 1, 9.

[379] Stiles *v.* White, 11 Met. (Mass.), 356.

[380] Estell *v.* Myers, 56 Miss. 800; Carr *v.* Moore, 41 N. H. 131; Lunn *v.* Shermer, 93 N. C. 164; McCabe *v.* Desnoyers, 20 S. Dak. 581, 108 N. W. 341.

[381] Hauk *v.* Brownell, 120 Ill. 161.

[382] Smith *v.* Bolles, 132 U. S. 125, 129, 33 L. ed. 279, 10 Sup. Ct. 39.

worth the price paid for it; nor if the stock were worthless could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

"Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact that would necessarily be applied in reduction of the damages, 'The damage to be recovered must always be the *natural* and *proximate consequence* of the act complained of,' says Mr. Greenleaf;[383] and 'the test is,' adds Chief-Justice Beasley in Crater *v.* Binninger,[384] 'that those results are proximate which the wrongdoer from his position must have contemplated as the probable consequence of his fraud or breach of contract.'"

The doctrine of this case, which is the law of the Federal Courts, is accepted in several jurisdictions.[385]

[383] Vol. 2, § 256.

[384] 33 N. J. L. 513.

[385] *United States:* Sigafus *v.* Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. ed. 113; McHose *v.* Earnshaw, 55 Fed. 584, 5 C. C. A. 210; The Normannia, 62

The *ratio decidendi* of this case would seem to be that the action was brought, not upon the contract of warranty, but for a tort. Compensation is asked for loss caused by the defendant's *false statements;* and to determine its amount, the question should be, what greater amount of property would the plaintiff have if the defendant's statements had not been made? The plaintiff's loss is not the value of his bargain; for it is necessary to the very maintenance of the action to show that the bargain would not have been made if the defendant had not made the false statements complained of. If these had not been made, therefore, the plaintiff would have the consideration he paid, but nothing more; and the difference between that consideration and the actual value of the property represents all the loss that was caused by the defendant's tort. It is usually said that if the statements had not been false the plaintiff would have property of the quality represented, which he loses by the defendant's wrong, and, therefore, that his loss is measured by the rule as ordinarily stated. To this the answer seems to be that the defendant's tort did not consist in the *falseness* of the statement, but in the *making* of the statement fraudulently; the result of the tort being not to change the value of a bargain, but to cause the plaintiff to part with his property against his will. The whole value of the consideration would be the amount to be recovered, if the rule of reduction of damages did not re-

Fed. 469, 481; Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994, 20 C. C. A. 244; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633; Hindman *v.* First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Pittsburg L. Ins. Co. *v.* Northern C. L. Ins. Co., 140 Fed. 888; Kell *v.* Trenchard, 142 Fed. 16, 73 C. C. A. 202.

Maryland: Pendergast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539; Buschman *v.* Codd, 52 Md. 202, 209.

Minnesota: Reynolds *v.* Franklin, 44 Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540; Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563; Wallace *v.* Hallowell, 56 Minn. 501, 58 N. W. 292, 45 Am. St. Rep. 491; Freeman *v.* F. P. Harbaugh Co., 130 N. W. 1111.

New Jersey: Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737.

Oregon: Cawston *v.* Sturgis, 29 Ore. 331, 43 Pac. 656.

Pennsylvania: High *v.* Berret, 148 Pa. 261, 23 Atl. 1004.

Washington: Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55; Klieb *v.* McInturff, 114 Pac. 184.

The same rule applies to sales of land induced by fraud of the vendor. Atwater *v.* Whiteman, 41 Fed. 427; Glasful *v.* Northern Pac. Ry., 43 Fed. 900; Sigafus *v.* Porter, 179 U. S. 116, 21 S. C. 34, 45 L. ed. 113; *post,* § 1029.

quire the value of property obtained by the defendant's act to be subtracted.

Under this doctrine lost profits cannot be allowed, but any fact bearing on the actual value of the property received is admissible, *e. g.*, the cost of repairs needed to put it in condition for use.[386] If notwithstanding the misrepresentation the property was actually worth what was paid for it, there can be no recovery in an action for deceit.[387] But the vendee is not remediless; there is nothing in the doctrine of Smith *v.* Bolles which excludes the vendee from suing for breach of warranty.[388] In that case he is entitled to have the representation made good.

§ 779. English rule.

The rule in England accords with the doctrine of Smith *v.* Bolles. In Peek *v.* Derry,[389] an action for false representations in the sale of shares, Cotton, L. J., delivering the opinion of the Court of Appeal on the question of damages, said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over the £4,000 and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4,000. The loss, therefore, must be the difference between his £4,000 and the then value of the shares." And Sir James Hannen added: "The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had

[386] Nashua Sav. Bank *v.* Burlington Electric Lighting Co., 100 Fed. 673.

[387] *United States:* Kell *v.* Trenchard, 142 Fed. 16, 73 C. C. A. 202.

Minnesota: Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767.

That the value of the property is to be estimated not at the time of the sale but at the time the fraud was discovered, see Smith *v.* Duffy, 57 N. J. L. 679; Goodwin *v.* Wilbur, 104 Ill. App. 45.

[388] Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994, 36 U. S. App. 634, 20 C. C. A. 244.

[389] 37 Ch. Div. 541, 591, 594; *acc.*, Twyeross *v.* Grant, 2 C. P. Div. 469, 544; McConnell *v.* Wright, [1903] 1 Ch. 546.

his £4,000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got."

§ 780. General discussion.

Since the action sounds in tort the natural rule for damages is that adopted by the Supreme Court. If the fraud had been perpetrated by some third person inducing the vendee to purchase there can be no doubt as to the measure of damages: the plaintiff would then be entitled only to the difference between what he paid and what he received. Logically it should make no difference that the fraud was perpetrated by the vendor, instead of by the third person. And to have a different rule might lead to peculiar results. Thus, suppose a fraud were jointly perpetrated by the seller and a third person. It is a strange rule of law which would give a different measure of damages in an action against one joint tort feasor from that given in an action against the other, yet that would seem to be the consequence of the old rule.

At any rate if a different rule is to be applied against the vendor some affirmative reason for so doing must be shown. Let us examine some of the reasons advanced. It is usually urged that the misrepresentation gives rise to an action for breach of warranty as well as an action for deceit, and that it is absurd to apply a different rule of compensation according to the form of the action. First of all it is to be noted that this reason proceeds upon the assumption that the same facts give rise either to an action for breach of warranty or for deceit; in other words, that these actions are merely alternative forms of relief for the same wrong. If this were so the argument would have weight. But it is an erroneous assumption arising from a confusion by the courts of three different actions: (1) the action of *assumpsit* for breach of warranty; (2) the action of tort, *in the nature of deceit*, for breach of warranty; (3) the strict action of deceit. As we have seen [390] all three forms of action sprang from a common origin—the old action of deceit. But the requisites for an action on the warranty gradually lapsed. No *scienter* was required; [391] and in time a mere representation, which in fact was untrue, gave rise

[390] *Supra*, § 761*a*.

[391] Williston on Sales, §§ 195 *et seq.*

to an action for breach of warranty; and the action might be brought either in assumpsit, or in tort. The requisites for both were identically the same, and hence in this instance the strict logic of the law has readily yielded to common commercial understanding and the same measure of damages is now applied to either form of action. But the reasons which justify ignoring the distinctions between the action of assumpsit and the action of tort in the nature of deceit do not apply when we are considering the strict action of deceit. For, just as the action of assumpsit itself originated in the action of deceit,[392] and developed into a separate action, to redress a distinct wrong, so the actions for breach of warranty have become distinct, from the old action of deceit. The requisites of the three actions are not the same. The very gist of the action of deceit is fraud,—an element unnecessary to an action on the warranty. It is true that the fraudulent representation also gives rise to an action on the warranty. But the converse is not true; an action of warranty may be brought when deceit does not lie. Hence it follows that the additional element of fraud creates a wholly distinct wrong, with a remedy peculiar to itself. The fact that under some circumstances this remedy does not give the vendee so much as the remedy for another wrong incidentally done, is simply a reason for seeking that other remedy.

§ 781. Considerations of practical justice.

Are there any reasons of practical justice that require the courts to treat the action of deceit as equivalent to an action for breach of warranty? Let us consider this question, *first* from the point of view of the vendee; *second* from the point of view of the vendor.

Adherence to logical principles can by no possibility work a hardship to the vendee. If his damages in an action of deceit, under the Smith *v.* Bolles rule, are less than under the other rule, he has simply made a blunder in suing for the fraud. He has the right to sue in *assumpsit* for breach of warranty.[393] This circumstance also disposes of the objection that under

[392] *Supra*, § 761.

[393] Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994, 36 U. S. App. 634, 639, 20 C. C. A. 244.

the Smith *v.* Bolles doctrine a vendor can with impunity misrepresent the goods since he is certain, ultimately, to realize the actual value of the goods and thus can lose nothing by his fraud.

On behalf of the vendor it is urged that even though he did misrepresent the goods yet he should not lose the benefit of his bargain. Suppose for example that the vendee was induced to pay $11,000 for goods actually worth $9,000, but which would have been worth $10,000 if the representations were true. Under the rule in Smith *v.* Bolles the vendee's recovery would be $2,000. Under the other rule, $1,000. It is contended that if the vendee was willing to give $11,000 for $10,000 worth of goods he should have no redress to that extent. But this is not an argument against the Smith *v.* Bolles doctrine; it is, rather, an argument against the measure of damages generally adopted in actions of deceit, whether against vendors or third parties. It has frequently been rejected by the courts, when urged by a fraudulent third party, on this ground; there is no basis for assuming that the vendee would have given $10,000 for the goods if there had been no misrepresentation. Indeed, the qualities which the goods were represented to have had may have been the very thing that induced the vendee to purchase at an excessive valuation. Where such a doubt exists it does not lie in the mouth of the fraudulent person to ask to have the doubt resolved in his favor. The same reasoning applies when the vendor is the defendant.

Moreover, the old rule is really inconsistent with allowing a defrauded vendee the well-recognized alternative remedy of rescission. The fact that he has this remedy shows conclusively that the vendor has no such "right to the benefit of his bargain" as is claimed. And if this benefit can be taken away from him where rescission is possible, it is difficult to see why the vendee's right should be less where rescission is impracticable or where he elects to pursue the alternative remedy and sue for the tort. The amount of the damages to be recovered in tort should therefore be as nearly as possible equivalent to rescission. And this result is just what the Smith *v.* Bolles rule accomplishes.

Instead of finding positive reasons for departing from the logical measure of damages in an action of tort, therefore, the reasons both theoretical and practical seem to support the Smith *v.* Bolles doctrine. The defrauded vendee has, accordingly, three alternative remedies: [394] *first*, rescission and recovery of the consideration; *second*, an action for deceit and recovery for his actual loss, *i. e.*, the difference between the value of what he parts with and of what he receives; *third*, an action for breach of any warranty contained in the contract of purchase and recovery of the difference in values between the property as received and the value as warranted.

V.—Foreign Law

§ 782. Justinian's laws.

* The general language of the Roman law is, that in case of the breach of contract of sale by non-delivery, the measure of damages is all that the buyer loses or fails to gain in relation to the thing itself, over and above the price paid; *id quod interest propter rem ipsam non habitam.* And, embarrassed by no form of action, the civil law inquires in each case into the motives of the defendant, and apportions the damages according to his delay, fault, or fraud.

The language of the Digest on the subject of damages for non-delivery is as follows: *Si res vendita non tradatur, in id quod interest agitur; hoc est quod rem habere interest emptoris.*[395] *Si traditio rei venditæ, juxta emptoris contractum, procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus præses provinciæ, tantum in condemnationis taxationem deducere curabit. Hoc autem pretium egreditur, si pluris interest quam res valet, vel empta est.* And so, again, *Quum per venditorem steterit quominus rem tradat, omnis utilitas emptoris in æstima-*

[394] Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994, 20 C. C. A. 244, 36 U. S. App. 634, 639. The court in a second statement of these principles makes the rule in the second case "the difference between the value of what he had before he made the contract and the value of what he would have had after the contract was made if it had been duly performed by both parties," *i. e.*, the difference between the consideration and the value as represented. This, however, is obviously an error in restatement.

[395] Pandects by Pothier, vol. 7, pp. 120, 121, lib. xix, tit. i, de Actionibus Emti et Venditi.

tionem venit, quæ modo circa ipsam rem consistit. Neque enim si potuit ex vino (puta) negotiari et lucrum facere, id æstimandum est: non magis quam si triticum emerit, et ob eam rem quod non sit traditum, familia ejus fame laboraverit. Nam pretium tritici, non servorum fame necatorum, consequitur. Nec major fit obligatio quod tardius agitur, quamvis æstimatio crescat, si vinum hodie pluris sit: merito; quia, sive datum esset, haberet emptor, sive non; quoniam saltem hodie dandum est quod jam olim dare oportuit.

The form of action prescribed against the seller of any merchantable commodity, who was in fault for not delivering, was the *Condictio triticiaria;* [396] and when treating of this subject, the Digest says: *Si merx aliqua, quæ certo die dari debebat, petita sit; veluti vinum, oleum, frumentum, tanti litem æstimandum Cassius ait, quanti fuisset eo die quo dari debuit; si de die nihil convenit, quanti tunc judicium acciperetur.*[397]

But these and other texts of the Justinian law on this subject, as on many treated of in that wonderful repository of acute and profound but ill-arranged decisions, are contradictory and perplexing. And their general terms throw little light on the complex relations of modern commerce.**

§ 783. Civil law authorities.

* The modern writers of the civil law furnish us with but little assistance on the questions which we have considered in this chapter. Even the masterly treatises of Pothier, and the profound commentary by his favorite author, Molinæus or

[396] *Condictio triticiaria a tritico, tanquam nobilissimo mercium genere, vel a primis edicti verbis dicta, est actio personalis arbitraria ad rem quamlibet, præter pecuniam numeratam spectans, et ex quâcumque causâ debitam, vel etiam nostram, ex causis quibus condici potest, veluti ex causâ furtivâ vel re mobili vi abrepta.* Vicat Vocabularium Utruisque Juris, in voc. Conf. Hevelke, Juristisches Wörterbuch.

The original Roman proceeding, *per condictionem*, one of the earliest of their curious and complex forms of action, and the true character of which had become dubious even in the time of Gaius, took its name from the act peculiar to it, namely, the *condictio*, or notice given by the plaintiff to the defendant, to be present on the thirtieth day to select a judge, *ut ad judicem capiendum, die tricesimo adesset.* Das Römische Privat Recht, von Wilhelm Rein, book 5. The *condictio* of the Digest, in the time of Justinian, was a more modern form. It seems to have been analogous to our action of debt, in that it demanded some certain thing, or a sum certain of money, the price of it.

[397] Dig. De Con. Trit. lib. xiii, tit. 3, § 4.

Dumoulin, on this subject, are rather to be referred to for the purpose of philosophical speculation than as authorities for our guidance.[398] The total diversity of our forms of action, together with the far greater arbitrary discretion exercised in the matter of damages by the civil law and those systems which adhere to its teaching, render its authors on this subject of comparatively little value to us.

The following is one of many instances put by Molinæus: *Venditor fundi vel domus, recepto pretio, fuit primum in morâ tradendi: unde damnatus ad fructus vel mercedes moræ, et in id quod extrinsecus emptoris ob eam moram interfuit, quod probatum fuit ascendere ad ducenta, quæ solvitâ, re traditâ, sed posteâ evincitur, et emptor multo magis extrinsecus damnificatur: utrum in æstimatione, et interesse evictionis debeant in duplo computari illa ducenta ob præteritam moram non tradendi soluta?* § 90. Here, beyond the direct loss sustained by the delay, *extrinsic damage* is allowed.

The arbitrary discretion of the tribunal which has cognizance of the cause, is clearly stated by him in the following language: *Ut si inter mercatores et negotiatores frumentum certo die et loco: puta, tali portu promissum sit, quo tempore et loco prævidebant contrahentes creditoris interesse, et eum alioquin damna passurum, et tamen debitor per moram vel culpam etiam circa dolum malum fefellit. Ipsa enim æquitas et communis commerciorum utilitas, et fides hoc casu exigit, non solum æstimationem quanti plurimi si qua sit, sed etiam extrinsecum interesse (verumtamen propinquum et efficax prestari) quod etiam jura apertè volunt, dum hoc casu faciunt actionem arbitrariam, ut videlicet detur judici judicaturo arbitriam et potestas, non solum super principali et æstimatione quanti plurimi, quæ videtur pars rei, sed etiam super adjudicatione et taxatione hujus interesse.* § 97.

A large portion of this treatise is occupied with the subject of eviction. The phrase is also used by the civil law where the title to personal property fails; and here we shall see that the

[398] Pothier, Contract de Vente, part ii, ch. i, art. 5, §§ 79 *et seq.* and sect. 2, art. viii, §§ 150 *et seq.* Pothier's "Contract of Sale," translated by L. S. Cushing. Pothier allows the buyer the expense of the contract, the fees paid to the head landlord, expense of journeys to see the property, wagoners sent to fetch it, §§ 69 and 70; and the rise in price of the article, even where there has been a subsequent fall, is expressly given by § 86.

limit of recovery is not, as in regard to land, the price paid, but the value of the article at the time of sale. Molinæus thus discusses the case of eviction of a slave, who, after being long serviceable to the purchaser, is finally taken from him in advanced age, by title paramount; and he well holds that the price would not be the just measure of damage against the seller in such a case. *Tum cum non venderetur res soli nec perpetuo durabilis, sed quæ ultra certum tempus vivere et usui esse non posset, certum est non esse actum, nec cogitatum, ut frui, te habere liceret perpetuo, sed solum ad tempus vitæ, quod verisimiliter prævisum et æstimatum fuit, et ad verisimilem durationem majus vel minus definitum pretium. Igitur hoc casu pretium conventum non est pretium perpetuæ durationis, et fruitionis vitæ verisimiliter expensæ, et appreciatæ. Cum ergo toto ferè tempore vitæ prævisæ fruitus sit emptor nec per evictionem absit nisi modicum et ferè inutile tempus non potest totum pretium repetere, cum intus habeat totum ferè commodum et fructum prævisæ fruitionis et usus.* § 127.[399]

Huberus, another very eminent master of the modern civil

[399] Dumoulin's Treatise, De eo quod Interest (Caroli Molinæi Opera Omnia, Parisiis, 1681, vol. 3, p. 423), is a commentary on the code, De Sententiis quæ pro eo quod interest proferuntur. Cod. lib. vii, tit. xlvii; the leading clause in which is, *Sancimus itaque in omnibus casibus qui certam habent quantitatem vel naturam, velut in venditionibus et locationibus et omnibus contractibus, hoc quod interest dupli quantitatem minime excedere.*

A great portion of this treatise is now entirely valueless. Thus, no small part of it is occupied with laborious discussions of the true definition of the term *interest—interesse extrinsecum, interesse communis, interesse conventum et non conventum*, § 16; and a variety of questions growing out of the terms of the law commented on, as *quid sit illud simplum ad quod interesse singulare refertur et duplatur; qui sint casus certi et qui incerti.* § 20.

No small portion of it is devoted to refuting other glossators and discutants of similar questions, thus: *Ex quibus apparet Curt. aliorum scripta neglectim, et prefunctorie transcurrisse, et novam hanc opinionem ex capite proprio fabricasse*, § 28; and again, *Jacobus autem Renal. in suo confusaneo de his tractatib. jactat se novam opinionem affere sed inani prolixæ inceptæ verbositatis fumo nihil enim prorsus novi adfert, sed post multam inanem elocutionem in Bart. et communem opinionem sese revolvit, et nihil addit nisi quod confusionem auget.* § 29.

It contains, also, much discussion on the subject of evictions, of the *stipulatio duplæ*, and the remote damages due in case of negligence. It is curious throughout, replete with the learning of that age, and with a vigor and subtlety which would do credit to any age, but of little practical utility to us.

No one can fail, in turning to the treatises of the great masters of the civil law, to perceive how much they

law, after defining damages according to the civil law to be, nothing other than the profit lost, or the injury sustained, *æstimatio damni illati et lucri cessantis*, declares the subject to be controlled by these three rules: *first*, that taken from the code, which we have elsewhere considered, that in regard to things certain the compensation shall not exceed the *double*. *Second*, that the direct and not the remote results are to be accounted for, subject, however, to the provision that, in cases of fraud, all damage sustained is to be made good; and *third*, that in estimating injury, the general opinion, or, in regard to things vendible, the market value, and not the particular estimate of the injured party, is to govern. But it is doing injustice to the clear brevity of the original to attempt a translation: I. *In casibus certis, ubi de speciebus vel quantitatibus definitis agitur, non potest excedere duplum: l. un. C. de Sent. quæ pro eo quod int.* II. *Lucrum oportet circa rem ipsam consistat, in eâque sit radicatum, ut DD. loquuntur, non foris advenians aut fortuitum: l. 21, § 3, de act. empt. Detrimenta tamen omnia præstantur si dolus intervenerit; aliter quanti minoris: l. 13, pr. d. t. de ac. empt., l. 19, § 1, locati.* III. *Lucri et damni ratio ex judicio communi, non affectione peculiari initur; nam hæc in phantasia hominum consistit, cujus æstimatio nulla est: l. 33. ad L. Aquil.*[400]

He then proceeds to illustrate these rules. A party who had let a certain pottery to another was unable to perform his agreement. The hirer proved that he could have made in a year (the term is not stated) a thousand florins, and recovered that amount. But, says the author, he should only have had judg-

are benefited by the superior harmony and logic of their system. Unembarrassed by any conflict of legal and equitable jurisdictions, unperplexed by forms of action, relieved from a great portion of our distinctions between real and personal property, and thus emancipated from a multitude of futile technicalties which have no bearing whatever on the rights of parties, their discussions have a clearness, an order, and a scientific precision, that it is in vain to hope for under our incongruous system.

But, on the other hand, we are not without compensation. We search in vain in the pages of these writers for the accurate practical teaching of our law; and we sadly miss the sharp analysis of actually occurring cases, which gives so much interest and value to the great body of our jurisprudence, making it, instead of a mere repository of theoretical discussions, a faithful portraiture of the actual wants, interests, and passions of mankind.

[400] Huber, Prael. Jur. i, 405, § 17.

ment for 300 florins, because the annual rent of the farm was 150 florins: *Quod erat simplum, et contractus locationis est certus, id est certæ quantitatis; tales autem duplum egredi non possunt: quæ regula,* exclaims Huberus, *incredibile est quam vulgo ignota visa est!* [401]

In illustration of the second rule, he states this case: Hypolytus ab Arssen had purchased certain turf pits, with an agreement that the seller should give him the right of way through a certain ditch, requisite to remove his turf. After the sale, however, the purchaser found that the seller had intentionally (*per dolum*) left a strip of earth between him and the ditch, so that he could not use it. The plaintiff proved that at the time of the obstruction he could daily make forty florins; but that, afterwards, prices had fallen to twenty florins, at which he had been obliged to sell his turf. *Condemnatus est venditor in id quod emptoris interesset. Cum ad taxationem ejus quod interest preventum esset,* the plaintiff claimed this sum, namely, the price at forty florins, which greatly exceeded twice the purchase money of the whole land. But for the defense it was contended, 1. That the alleged price of turf was extraordinary. 2. The injury was not sufficiently direct, for the plaintiff might have gone round through the land of other parties, or he could have thrown a bridge over the obstacle, and thus transported his turf. 3. That the buyer had an offer of thirty-two florins, which he had refused; and that, consequently, the seller was not liable unless, perhaps, for the expense of the bridge that the buyer might have made, and the transportation of the turf over it. Huberus thus answers these arguments: 1. The price was the common one, and, at all events, the objection was inadmissible in a case like this of fraud. *Præterea per dolum hic prætextus excludebatur.* 2. The objection came too late, because the seller was already condemned to respond in damages. As to the bridge, it was not to be required that this idea should have suggested itself to the buyer, nor was he bound to resort to such an expedient in case of fraud. 3. The buyer was not bound to receive thirty-two florins for his turf at a time when he could sell them for forty. But the cause was decided on the basis of the offer of thirty-two florins; and Huberus seems

[401] Vol. iii, p. 88.

to deplore the arbitrary control exercised by the courts over the subject of compensation. *Quanquam juris ignitur rationes, pro triumphante* (the plaintiff) *militaire viderentur, tamen ut est hujus rei praxis valde lubrica et tantum non arbitraria, factum est ut venditor vix ultra quam obtulerat sit condemnatus.*[402] It might be curious, if our space permitted, to compare the decision here made with what it would be in a similar case—say, a conveyance with a covenant of right of way—according to our jurisprudence.

Among the more recent writers on the modern civil law, we find the same absence of any definite rule, of which I have already complained. Domat says,[403] the seller who fails to deliver must pay the damages caused by his default, according to the circumstances of the case. Thus, he who contracts to deliver any article of merchandise, the price of which rises at the time and place fixed for delivery, must pay the actual value at such time and place, as well on account of the profit that the purchaser would have made by reselling them there, as on account of the loss that he sustains by being obliged to purchase other articles at a price exceeding that of his bargain. So, he says that thepurchaser would be entitled to his expenses actually incurred on coming to receive the article which was to have been delivered, but that remote and unforeseen consequences are not to be taken into consideration. Thus, for instance, if the seller failing to deliver the commodity at the time and place fixed on, the purchaser has been made unable to transport them to another place, where he could sell them at an advance; or if, by reason of the non-delivery of the article, he has been obliged to send off his workmen, and to stop some work of which the cessation causes him considerable injury, the seller will be considered liable, neither for the profit lost nor the injury sustained; for these consequences are not to be imputed to the default of delivery, but result from the arrangements of a higher power, and accidental circumstances which no one can control.[404] **

[402] Huberus, Prael. Juris., vol. iii, pp. 88, 89, §§ 30 to 35.

[403] Contrat de Vente, Loix Civiles, liv. 1, tit. 2, sec. 2, § 27. Troplong, in his masterly treatise *De la Vente*, complains of the looseness of Domat on the subject of the measure of damages; but the difficulty appears to be rather in the system than in the author.

[404] Cont. de Vente, liv. i, tit. 2, sec. 2, § 18.

CHAPTER XXXVI

ACTIONS UPON CONTRACTS OF INDEMNITY

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807c. Interest and attorney's fees.
808. Costs and legal expenses.
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§ 784. Contract of principal and surety.

* The contract of suretyship is one of very frequent occurrence, arising in some cases by implication of law, as between the parties to negotiable paper, or debtors and their bail; in others it is created by express agreements of guarantee. These, again, sometimes take the form of indemnities and contracts to save harmless, and at others assume the more binding shape of express contracts to do the particular thing in question; in which last case, indeed, the peculiar relation of principal and surety often ceases to exist.[1]

[1] "In ancient times," said Buller, J., in Toussaint *v.* Martinnant, 2 T. R. 100, "no action could be maintained *at law*, where a surety had paid the debt of his principal. Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise."

The questions that ordinarily present themselves, as between the principal debtor and the party who has assumed for him the obligations of a surety, relate to the circumstances which entitle the latter to call for repayment of any sum he may have been obliged to pay for him; the mode of that payment; and the collateral expenses, legal or otherwise, of which he can demand reimbursement. These questions sometimes arise in actions by sureties against their principals, sometimes in suits against the sureties themselves; and though the law generally tends to favor the surety, still, so far as the construction of the contract is concerned, no difference is made as to the manner in which the case is presented.

There is another class of cases of a mixed character, where actions are brought against sureties for sheriffs, constables, or other public officers. As these cases involve the consideration of the principles of the measure of damages in actions on official bonds, we have already treated them in the chapter on that subject. It is only necessary, therefore, here to consider the liabilities of principal and surety as arising out of private contract.

Let us first bear in mind the clear distinction that exists between two classes of cases, falling under the general head. "It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences are essentially different." [2] **

§ 785. Implied contract of indemnity.

* A surety for the payment of money cannot call on his principal until he has paid the debt.[3] So it was early held by Lord Mansfield, in regard to a surety in a bond; "till damnified," said his lordship, "which he could not be till he had been called upon and had paid, he could not bring an action." [4] And so

[2] Gilbert *v.* Wiman, 1 N. Y. 550, 562, 49 Am. Dec. 359.

[3] *Kansas:* Churchill *v.* Moore, 15 Kan. 255.

Michigan: Hall *v.* Nash, 10 Mich. 303; Butler *v.* Ladue, 12 Mich. 173; Thompson *v.* Richards, 14 Mich. 172; Kenyon *v.* Woodruff, 33 Mich. 310.

New York: Burt *v.* Dewey, 40 N. Y. 283, 100 Am. Dec. 482.

[4] *United States:* Pigou *v.* French, 1 Wash. C. C. 278.

it has been held in New York, where the surety had been sued and charged in execution, that not having paid the debt, and having no promise to indemnify him, he could not recover against his principal.[5] For this a technical reason also exists, that the only action that can be maintained in such case is assumpsit for money paid, which, of course, will not lie until money or its equivalent is paid.** There is in this case no express contract of indemnity, and no reason for the law to create a promise until the surety has actually lost property for which the principal should in equity compensate him.

§ 786. Express contract of indemnity.

* Where the plaintiff holds an express promise to indemnify and save him harmless, there he can maintain an action without having paid the debt; and we shall presently examine the extent of compensation allowed for the injury he alleges himself to have sustained.[6] But where the plaintiff holds not merely an agreement to indemnify and save him harmless against the consequences of the default of the other, but an express promise to pay a debt, or to do some particular act, then the position of the parties entirely changes. The relation of principal and surety disappears, and it has been held that the failure to perform the act agreed on gives the plaintiff a right of action even before he has suffered any direct damage himself; and so it has also been decided as a rule of pleading.

Where the defendant agrees to discharge the plaintiff from any bond or other particular thing, there the defendant, having agreed to do a particular act, cannot plead *non damnificatus;* but where the condition is to discharge the plaintiff *from damage* by reason of any particular thing, or to *indemnify and save harmless,* there the damage must be shown, and consequently *non damnificatus* is a good plea.[7] **

New York: Powell *v.* Smith, 8 Johns. 249; Rodman *v.* Hedden, 10 Wend. 498.

England: Taylor *v.* Mills, Cowp. 525; Paul *v.* Jones, 1 T. R. 599.

[5] Powell *v.* Smith, 8 Johns. 249.

[6] Rodman *v.* Hedden, 10 Wend. 498. The bail of a deputy sheriff are not liable unless the sheriff has been damnified or made legally liable in consequence of the dereliction of the deputy. Hughes *v.* Smith, 5 Johns. 168; Rowe *v.* Richardson, 5 Barb. 385.

[7] *New York:* Port *v.* Jackson, 17 Johns. 239; s. c. aff'd in Error, *Id.* 479; Thomas *v.* Allen, 1 Hill, 145. These two last cases overrule that of Douglass *v.* Clarke, 14 Johns. 177.

England: Cutler *v.* Southern, 1

§ 787. Interpretation of the contract.

In all covenants of indemnity, therefore, a preliminary question of interpretation arises; and it becomes necessary to decide whether the contract is to pay a sum of money or discharge one from a debt or liability, or whether it is merely to save harmless or to protect from damage. If the former is the case, the contract is broken, and damages are to be recovered upon the defendant's failure to pay the money or discharge the debt; if the latter, the contract is broken only when the plaintiff suffers damage by reason of the liability covenanted against.

§ 788. Measure of damages on contracts of indemnity.

The general rules are as follows: If the defendant contracted to pay or discharge a debt, the measure of damages is the amount of the debt.[8] If the defendant contracted to save the defendant harmless from a *liability*, it has been held that the amount of the liability is the measure of damages, though the plaintiff has not paid it.[9] But if the contract was merely to indemnify or save the plaintiff harmless from a debt, the measure of damages is the amount the plaintiff has already paid on the debt.[10]

§ 789. Contracts to pay or discharge a debt.

Upon breach of a contract to pay or to discharge another's debt, an action lies at once, upon default, to recover the amount of the debt, without proof by the plaintiff that he has paid it; [11]

Saund. 116, note 1; Holmes *v.* Rhodes, 1 B. & P. 638; Hodgson *v.* Bell, 7 T. R. 97.

[8] Cases cited in § 789.

[9] Cases cited in § 795.

[10] Cases cited in § 793.

[11] *Connecticut:* Lathrop *v.* Atwood, 21 Conn. 117.

Illinois: Gage *v.* Lewis, 68 Ill. 604; Pierce *v.* Plumb, 74 Ill. 326; (but see Israel *v.* Reynolds, 11 Ill. 218).

Indiana: Smith *v.* Rogers, 14 Ind. 224, 227, 77 Am. Dec. 67 (*semble*).

Iowa: Stout *v.* Folger, 34 Ia. 71, 11 Am. Rep. 138.

Maryland: Dorsey *v.* Dashiell, 1 Md. 198, 54 Am. Dec. 649.

Massachusetts: Farnsworth *v.* Boardman, 131 Mass. 115; Shattuck *v.* Adams, 136 Mass. 34.

Minnesota: Merriam *v.* Pine City Lumber Co., 23 Minn. 314.

Missouri: Ham *v.* Hill, 29 Mo. 275, 77 Am. Dec. 572.

New Hampshire: Richards *v.* Whittle, 16 N. H. 259.

New York: Belloni *v.* Freeborn, 63 N. Y. 383; Seligman *v.* Dudley, 14 Hun, 186; Fletcher *v.* Derrickson, 3 Bosw. 181.

even though he is not personally liable for it,[12] and without reference to the consideration he has received.[13] Thus where one guarantees the payment of a certain sum, he is responsible at once, on non-payment at the time the payment is due, for the entire amount.[14] And this is true though no action would lie for the amount against the person who was to pay it.[15] So where, upon the conveyance of mortgaged land, one of the parties to the conveyance agrees to pay the mortgage debt when it becomes due, action can be brought on the agreement and the whole amount recovered upon the debt falling due and not being paid, though there has been no demand of payment.[16] So where one of a firm, having, on its dissolution, undertaken to collect its outstanding claims, gave his bond to pay all demands against it, and save the other partner and his sureties and indorsers, on account of said firm, harmless, it was held that the obligee could recover on the bond the amount of the partnership debts existing due and unpaid.[17] In Gage *v.* Lewis,[18]

Ohio: Porter *v.* State, 23 Oh. St. 320.

Pennsylvania: Dayton *v.* Gunnison, 9 Pa. 347.

England: Carr *v.* Roberts, 5 B. & A. 78.

Canada: Raymond *v.* Cooper, 8 Up. Can. C. P. 388.

But *contra* (that nominal damages only can be recovered unless the plaintiff has paid the debt), Dye *v.* Mann, 10 Mich. 291.

[12] Hodgson *v.* Wood, 2 H. & C. 649.

[13] Cooper *v.* Page, 24 Me. 73, 41 Am. Dec. 371; Oakley *v.* Boorman, 21 Wend. (N. Y.) 588.

[14] *United States:* Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393.

Iowa: Adams & F. Harvester Co. *v.* Tomlinson, 58 Ia. 129, 12 N. W. 13.

Nebraska: Flentham *v.* Steward, 45 Neb. 640, 63 N. W. 924.

[15] *Illinois:* Holm *v.* Jamieson, 173 Ill. 295, 50 N. E. 702 (guaranteed note void).

North Carolina: James *v.* Long, 68 N. C. 218 (principal debtor entitled to legislative scale).

[16] Promise by the grantee:

Connecticut: Redfield *v.* Haight, 27 Conn. 31.

Illinois: Gage *v.* Lewis, 68 Ill. 604.

Massachusetts: Locke *v.* Homer, 131 Mass. 93, 109, 41 Am. Rep. 199.

New York: In re Negus, 7 Wend. 499.

Promise by the grantor: Stearns *v.* Stearns, 129 Mich. 451, 89 N. W. 41.

[17] *Illinois:* Miller *v.* Kingsbury, 128 Ill. 45.

Indiana: Devol *v.* McIntosh, 23 Ind. 529.

Michigan: Lee *v.* Burrell, 51 Mich. 132.

Missouri: Ham *v.* Hill, 29 Mo. 275.

Nebraska: Ley *v.* Miller, 28 Neb. 822, 45 N. W. 174.

New York: Ralph *v.* Eldridge, 137 N. Y. 525, 33 N. E. 559; Sinsheimer *v.* Tobias, 53 N. Y. Super. Ct. 508.

Ohio: Wilson *v.* Stilwell, 9 Oh. St. 467.

See, however, Duran *v.* Ayer, 67

[16] 68 Ill. 604, 617.

a case of this nature, Scholfield, J., said: "It has ever been held that where a bond is given, intended as a bond of indemnity, but containing a covenant that the obligor will pay certain debts, for the payment of which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damnified, unless, from the whole instrument, it manifestly appears that its sole object was a covenant of indemnity." In a case before the Supreme Court of the United States,[19] it appeared that the defendant agreed that if the plaintiff would prosecute a claim against a third party and obtain judgment and levy on the property, he, the defendant, "would bid it off for whatever the judgment and costs might be." This he did not do, and the property was knocked down to the plaintiff for a nominal sum. Suit was then brought for the breach of the agreement, and the court held the defendant liable for the full amount of the judgment, with interest and costs. This ruling the Supreme Court affirmed, after a full consideration, notwithstanding the fact that the plaintiff would apparently by this decision be able to make use of the two judgments, and thus might recover more than the amount of his claim. * So in New York, where the plaintiff, as lessee for a term of years, had assigned it to the defendant, who executed a covenant

Me. 145, where the plaintiff recovered only what he had paid, but he did not except to the decision. The point decided was, that the plaintiff could recover, on a contract to pay the debts of a third party and to hold the plaintiff harmless, the full amount of the loss sustained, not to exceed the amount of the notes and interest. See also, Smith *v.* Riddell, 87 Ill. 165. The contract in Walker *v.* Broadhurst, 8 Ex. 889, was of a slightly different nature. The plaintiff entered into partnership with A. and B., on condition that they should furnish security as to the state of the firm. The defendant covenanted with the plaintiff that the amount due the old firm should not be less than a sum specified, and that the debts of the firm should not exceed a certain sum. It appearing that the debts exceeded the amount specified, but also that less than that amount had been paid on account of the liabilities of the old firm, it was held that the defendant's covenant was a contract of indemnity only, but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant; and that the amount of such damage was purely a question for the jury.

[19] Wicker *v.* Hoppock, 6 Wall. 94, 18 L. ed. 752. See argument of plaintiff in error, p. 95.

to pay the rent to the head landlord, it was insisted on the part of the defendant, that the plaintiff could only recover nominal damages unless he showed that he paid the rent; but the court said: "The covenant is express and positive that the defendant will pay the rent; and it would be against all reason and justice to say that the plaintiff shall himself first pay and advance the money before his right of action against the defendant to recover it arises"; and the rent was held to be the measure of damages.[20] ** The same rule has been applied by the New York Commission of Appeals to the breach by a lessee of an absolute covenant to pay taxes or assessments on the demised premises.[21] So where the defendant had agreed to pay certain notes and mortgages made by the plaintiff, to third parties, the plaintiff was allowed to recover the full amount, though unpaid.[22] And on an agreement by the purchaser of an equity of redemption that if the mortgage were foreclosed no personal judgment should be taken against the plaintiff the measure of damages is the amount of a judgment so recovered, though it has not been paid.[23]

* So again, if one, by bond, guarantees that a third party shall pay a certain sum of money by a given day, on demand, the plaintiff must assign the non-payment of the money by the third party as a breach of the condition of the bond sued on, but he is not bound to give any further evidence of the extent of his damages, the instrument itself fixing the amount he is entitled to recover; and it was so held against the defendant, who insisted that, in the absence of such evidence, the plaintiff could only recover nominal damages.[24]

[20] *New York:* Port *v.* Jackson, 17 Johns. 239, 245; s. c. in error, *Id.* 479.

England: See Toussaint *v.* Martinnant, 2 T. R. 100; Martin *v.* Court, 2 T. R. 640; Hodgson *v.* Bell, 7 T. R. 97; Atkinson *v.* Coatsworth, 8 Mod. 33.

[21] Trinity Church *v.* Higgins, 48 N. Y. 532.

[22] Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341.

[23] Banfield *v.* Marks, 56 Cal. 185. Upon the analogy of these decisions the case is probably to be upheld elsewhere cited, where it was decided that in an action brought on a covenant to discharge an existing incumbrance, the plaintiff was entitled to recover the full amount of the incumbrance, though nothing had been paid. Lethbridge *v.* Mytton, 2 B. & A. 772.

[24] Mann *v.* Eckford, 15 Wend. 502; *In re* Negus, 7 Wend. 499. So where the defendant, having guaranteed to keep the plaintiff clear of back interest, failed to do so, it was held that the plaintiff was damnified from the mo-

And a similar decision was made in the English Exchequer.[25] The defendant was indebted to H. D. and G. B. in the sum of £400, secured by a promissory note made by the defendant, and by the plaintiff as the defendant's surety; and thereupon the defendant covenanted that he *would pay H. D. and G. B.* the sum of £400, on or before the thirteenth of August then next; breach, non-payment by the day. On the trial it appeared that the plaintiff had been notified that he would be held liable on the note; but the note was not paid, and the defendant insisted that the plaintiff was only entitled to nominal damages. The Lord Chief Baron Abinger overruled the objection; and the plaintiff had a verdict for the note and interest. On showing cause why there should not be a new trial, this was held right. Alderson, B., said: "To what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant;" [26] and he likened it to an action of trover for title deeds.**

The following case carries out this doctrine to its fullest extent: One Jennings had bequeathed to the children of his granddaughter, a Mrs. Button, on her death, a legacy of £400, to be paid at the age of twenty-one to the survivors who reached that age, and the testator devised part of his estate charged with the legacy, in moieties to his two daughters; the plaintiff, as heir at law to one of the daughters, who had then died, effected a partition of the estate with the other daughter, each covenanting with the other to pay half the legacy. The plaintiff subsequently sold his part to the defendant, subject to the payment, by the defendant, of one moiety of the legacy to W. H. Parker, the only surviving child of Mrs. Button, who was dead, on his attaining the age of twenty-one, or to his personal representatives in case of his death under age, and *the defendant covenanted with the plaintiff to pay such moiety, and*

ment judgment was obtained against him, and might sue on the agreement. Gardner *v.* Grove, 10 S. & R. 137. In another case, however, the court told the jury they were at liberty to find for the whole amount of the plaintiff's liability, but *recommended* them to find only for the amount actually paid. Bauer *v.* Roth, 4 Rawle, 83.

[25] Loosemore *v.* Radford, 9 M. & W. 657.

[26] See Gunel *v.* Cue, 72 Ind. 34; Malott *v.* Goff, 96 Ind. 496.

indemnify the plaintiff against all liability on account of it. Parker died under twenty-one, and his administrator claimed a moiety of the legacy, which the plaintiff, claiming it himself, notified the defendant not to pay. A bill having been filed by Parker's administrator to compel the payment of the legacy to him by the plaintiff, it was, on the ground that the legacy was no longer a charge on his estate, dismissed with costs, though the plaintiff had to pay some costs as between attorney and client. The plaintiff having brought an action on the covenant alleging as breaches the non-payment of the moiety to Parker's personal representatives and the non-indemnity of the plaintiff, whereby the plaintiff incurred costs, it was held by all the judges that the plaintiff was entitled not merely to nominal damages, but to the full indemnity, including the £200 and the costs paid by the plaintiff.[27]

One English case seems to be opposed to the rule above stated. In that case it appeared that the plaintiffs lent the defendant £600 on the security of an indenture by which two policies on the defendant's life were charged with the loan. In the indenture the defendant covenanted to pay the premiums on the policies, which would become void unless these should be annually paid. The defendant paid the first premium only, and the plaintiffs sued him on his covenant for non-payment of three years' premiums. It was held that, as it did not appear the plaintiffs had sustained any loss, they were entitled to nominal damages only.[28]

§ 790. The rule not to be approved on principle.

* These decisions appear somewhat to conflict with the important and fundamental rule which has already been stated, that actual compensation will not be given for merely probable loss. Nor is the argument that the party, having bound himself to do a particular act, must therefore be held liable in the full amount, of greater weight.[29] There is a multitude of con-

[27] Hodgson *v.* Wood, 2 H. & C. 649.

[28] National A. & I. Assoc. *v.* Best, 2 H. & N. 605.

[29] This and the preceding remark are disapproved by Leonard, C., in Trinity Church *v.* Higgins, 48 N. Y. 532, 538. He observed that "parties have the just right to make all lawful contracts guarding their rights and securing performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and when

tracts of the same character, to which no such doctrine is applied. If, instead of a contract to pay a certain sum of money, the agreement be to do any other particular act, an inquiry is indispensable to ascertain how far the party plaintiff has been damnified by the non-feasance. It is, perhaps, no great stretch of reasoning to say that the damages arising from the non-payment of money should be measured by the sum itself. Still, a doubt may often arise whether the *party who holds the agreement* has been injured to that extent; and this is well pointed out by a very accurate judge, in Loosemore *v.* Radford.[30] Parke, B., said: "The defendant may, perhaps, have an *equity*, that the money he may pay to the plaintiff shall be applied in discharge of his debt; but, *at law*, the plaintiff is entitled to be placed in the same situation, under this agreement, as if he had paid the money to the payees of the bill." This remark of a very acute judge states the evil, but suggests no remedy. The law is thus carried into execution unattended by the equity which should temper it. It is one of many instances illustrating the inconvenience and serious hardships that often flow from the separation of the jurisdictions. Either the plaintiff should only be allowed to recover for actual loss; or, if the court proceed upon the idea of compelling the defendant specifically to perform his promise, it should carry the engagement into full execution, by applying the proceeds of the judgment where they belong. This a court of law possesses no power to do; and as it is incompetent to do complete justice, it should confine its remedies exclusively to those cases where actual injury appeals for redress.**

§ 791. Contracts to indemnify or save harmless.

* It appears, upon the whole, settled that if the engagement be collateral, or, more properly speaking, indirect, whether only implied in law, or whether it be an undertaking to indemnify and save harmless against the consequences of the default, there damage to be recovered must be proved. And

expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume to disregard it, in favor of some technical rule framed for other and wholly different circumstances."

[30] 9 M. & W. 657.

so it is held whether the action be by the surety against the principal, or by the creditor against the surety.**

§ 792. Early cases erroneous.

In a case at Nisi Prius, before Lord Ellenborough, on a bond conditioned to indemnify the plaintiff against a bond given by him to a third party, though it did not appear that he had paid it, his lordship said that he did not see any measure of damages except the penalty of the bond; and the jury so found.[31] *In a case in New York, this erroneous view of the subject was carried to a great length; and it is desirable carefully to notice the decision, and those by which it has been since overruled; for unless we adhere strictly to the principle that actual compensation shall only be awarded for actual loss, we are without any guide whatever in this branch of the law. Suit was brought [32] by the overseers of the poor against the sureties in a bond given by the father of an illegitimate child, before its birth, to save harmless and indemnify the town against all expenses by reason of the child. After the birth, an order was made by two justices, according to the statute, fixing the amount of the defendant's liability. It was insisted that this order was competent evidence against the defendant, and that the town was not bound to show the actual expenditure of the sum claimed; and it was so held by the Court of Errors.

It will be observed that here the covenant was merely to indemnify and save harmless, and did not reach to the extent of a promise to do the thing in the first place. It is to be noticed, also, that the whole scope of this reasoning is opposed to the general rule that actual compensation will only be given for actual loss, and cannot be supported but on the idea that a court of law is to assume the powers of a court of equity, and compel an imperfect kind of specific performance. If this

[31] Wood *v.* Wade, 2 Starkie, 167.

[32] Rockfeller *v.* Donnelly, 8 Cowen, 623, 639, 647, reversing Donely *v.* Rockfeller, 4 Cow. 253. The same point was again decided in People *v.* Corbett, 8 Wend. 520. But in Churchill *v.* Hunt, 3 Denio, 321, these decisions are said to rest entirely on the spirit and intent of the statute, "giving these bonds an effect which they would not have at common law;" and it is there said to be for the same reason that in a claim against the sheriff on bonds for the jail liberties, it is unnecessary to prove damage. Kip *v.* Brigham, 7 Johns. 168.

doctrine were maintained, covenantors against incumbrances would be compelled to pay before the incumbrance was discharged; covenantors for quiet enjoyment would be obliged to pay before eviction; and all parties agreeing to do a specific thing would be mulcted in the sum equivalent to performance without any proof whatever that the other party had been injured, or that his position was such that he could be.**

§ 793. Later cases follow the true rule.

* But this is not the result of the more recent authorities of the courts in this country. In an early case, the question "whether on an escape the bail to the liberties became liable for the whole penalty, or for the damages sustained by the sheriff by reason of the escape?" was raised in New York, but not decided.[33] But it was soon after said that neither the sheriff nor his assignee could recover without showing injury sustained, and that, consequently, recapture after the escape, or voluntary return, was an answer to a suit against the sureties for the liberties.[34] ** In another case, on an agreement to indemnify and save harmless against a certain demand, a judgment having been recovered on the claim in question against the plaintiff, but nothing having been paid thereon, the case of Rockfeller *v.* Donnelly was pronounced "a very questionable" one, and judgment was given for the defendant, the court saying: "This is not an agreement to indemnify against liability, but it is the common case of an agreement to indemnify against the claim or demand of a third person; and before the plaintiff can recover, he must show that he has been damnified; the mere fact that the demand has changed its form by having passed into a judgment is not enough." [35] Again, on a bond "to save harmless," it was said, "Here is no absolute agreement to pay, and no agreement to keep the party clear from liability, but merely to indemnify"; and it was held, that, in order to recover, damage, and that involuntarily sustained, must be shown. It was intimated, however, that "perhaps after a suit commenced, and notice given to the obligor, and neglect by him to defend, the obligee would be warranted in

[33] Jansen *v.* Hilton, 10 Johns. 549.
[34] Barry *v.* Mandell, 10 Johns. 563.
[35] Aberdeen *v.* Blackmar, 6 Hill, 324.

putting a stop to the costs." [36] In a later case in New York, the whole subject was considered in the Court of Appeals. The covenant was, that the plaintiff should not sustain any damage or molestation by reason of any liability incurred by his deputy. Judgment has been recovered against the plaintiff, but not paid; and it was held that he was not entitled to recover.[37]

In Valentine *v.* Wheeler,[38] where the contract (condition of bond) was to pay all demands, acceptances for which the plaintiff should be in any way responsible on account of the obligee, and to hold the plaintiff harmless and free from loss or inconvenience on account of any debts and claims of the obligee, the court construed this to be merely a contract of indemnity, and allowed the plaintiff to recover only what he had actually paid.[39] So in an action on a promissory note or other instrument given as an indemnity by a principal to his surety the measure of damages is the amount paid by the surety at any time before trial, and unless he has made an actual payment he can recover nominal damages only.[40] So in Truckie Lodge *v.* Wood,[41] where the defendant had put up a building for the plaintiff and had allowed liens to attach contrary to his agreements that it should not be "accountable" for any of the materials of construction, it was held that evidence of their amount was properly excluded, as the plaintiff had not paid them, although they were then in process of foreclosure.

§ 793a. No recovery without actual loss.

According to these authorities, the later American decisions establish the rule that if the contract is one of indemnity merely there can be no recovery without actual loss.[42] So where a

[36] Crippen *v.* Thompson, 6 Barb. 532, 536.

[37] Gilbert *v.* Wiman, 1 N. Y. 550, 49 Am. Dec. 359; *acc.*, Jeffers *v.* Johnson, 21 N. J. L. 73. In Ohio, see Ohio Life Ins. and Trust Co. *v.* Reeder, 18 Ohio, 35.

[38] 122 Mass. 566, 23 Am. Rep. 404.

[39] *Acc.*, Martindale *v.* Brock, 41 Md. 571; Kraft *v.* Fancher, 44 Md. 204.

[40] *Massachusetts:* Cushing *v.* Gore, 15 Mass. 69; Little *v.* Little, 13 Pick. 426. *New Hampshire:* Osgood *v.* Osgood, 39 N. H. 209; Child *v.* Eureka Powder Works, 44 N. H. 354.

[41] 14 Nev. 293.

[42] *United States:* Baetjer *v.* Bors, 7 Ben. 280. *California:* Lott *v.* Mitchell, 32 Cal. 23. *Connecticut:* Redfield *v.* Haight, 27 Conn. 31. *Maine:* Hussey *v.* Collins, 30 Me. 190.

water company, before being permitted to dig up a highway gave a bond to save the village harmless from damage arising from its negligence, and a person injured by the excavation had brought suit against the village, it was held that there could be no recovery until the claim had been paid.[43]

It follows that if a portion of the loss has been paid, the plaintiff can recover the balance of his loss, but that only;[44] and if a payment is made even after suit brought it is to be deducted from the amount recovered.[45]

These decisions replace this branch of the law on its proper basis, and declare the salutary principle, that actual compensation can only be given for positive loss unless it is evident that the parties have stipulated for a more extensive remuneration.**

§ 794. Actual loss always recoverable.

But the actual loss is always recoverable upon a contract of indemnity.[46] So where the defendant guaranteed the payment of a note which provided for interest after maturity at the rate of 20 per cent. per annum, he must pay interest at that rate.[47] Upon a contract of indemnity given to a mort-

Maryland: Gillespie *v.* Creswell, 12 G. & J. 36.

Massachusetts: Spencer Savings Bank *v.* Cooley, 177 Mass. 49, 58 N. E. 276.

Missouri: Citizens' State Bank *v.* Pettit, 85 Mo. App. 499.

New Hampshire: Osgood *v.* Osgood, 39 N. H. 209; Conner *v.* Bean, 43 N. H. 202.

New York: Scott *v.* Tyler, 14 Barb. 202; Selover *v.* Harpending, 54 N. Y. Super. Ct. 251; Selover *v.* Harpending, 18 Abb. New Cas. 252.

Texas: Clayton *v.* Franco-Texan Land Co., 15 Tex. Civ. App. 365, 39 S. W. 645.

In Boyle *v.* Boyle, 106 N. Y. 654, 12 N. E. 709, it was held that one who had received an indemnity against liability as surety on a bond cannot recover for litigation expenses not reasonable, but caused by his vain fears.

[43] Eldridge *v.* Crow, 7 N. Y. Misc. 150, 27 N. Y. Supp. 362.

But in Gamble *v.* Cuneo, 21 App. Div. 413, 47 N. Y. Supp. 548, an agreement to save plaintiff harmless from any damages he might sustain by reason of his continuance as one of the sureties on an appeal undertaking, it was held that the defendant must pay the entire amount of a judgment obtained against plaintiff on the appeal undertaking.

[44] Buffalo G. Ins. Co. *v.* Title & T. Co., 51 Misc. 267, 99 N. Y. Supp. 883.

[45] Shattuck *v.* Adams, 136 Mass. 34.

[46] *District of Columbia:* McKenzie *v.* Underwood, 21 D. C. 126.

New York: De Camp *v.* Bullard, 159 N. Y. 450, 54 N. E. 26.

Pennsylvania: Union Trust Co. *v.* Citizens' Trust Co., 185 Pa. 217, 39 Atl. 886.

[47] Gridley *v.* Capen, 72 Ill. 11. He

gagee upon selling timber from the mortgaged land, the measure of damages is the amount the land was depreciated in value by the removal of the timber. Where the land itself was not injured, and the sale was a fair one, the measure of damages is the amount realized from the sale.[48]

Action was brought on a bond of indemnity against damage to a vessel by reason of existing contracts. The vessel was libelled on an alleged contract and detained twenty-three days, when the libel was discharged upon the giving of a bond. It was held that the validity of the contract on which she was libelled need not be established, since the detention on the contract was indemnified against.[49] So a contract of indemnity against claims of a certain person on certain insurance moneys was held not to include merely valid claims, but any claims that might subject the party indemnified to costs or expense.[50] And on an agreement by a lessor, surrendering his lease and representing that the sub-tenants were yearly tenants, to indemnify the owner against claims of longer leases, the measure of damages where a longer lease was established was the difference between the rent reserved in such a lease and the actual rental value.[51]

§ 795. Contracts to save from liability, etc.

* Liability is a very different thing from damage; and the literal object of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability*, and is relieved from the obligation of proving *damage*. The only way to relieve the plaintiff from being liable to be made to pay the debt, is for the law to see to its extinguishment.[52] ** Thus, on a bond "to save harmless and indemnify against all damages, costs and charges to which the plaintiff's intestate might be sub-

cannot charge the principal with interest at that rate on the amount actually paid out by him. Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

[48] Curtis *v.* Baugh, 79 Ill. 242.

[49] Niagara Falls Paper Co. *v.* Lee, 20 N. Y. App. Div. 217, 47 N. Y. Supp. 1.

[50] Home Ins. Co. *v.* Watson, 59 N. Y. 390.

[51] Rosenberg *v.* Frankel, 123 App. Div. 700, 108 N. Y. Supp. 353.

[52] See, in Virginia, a suit by a sheriff on an indemnity bond against damages on levying an execution upon certain specified property. Dabney *v.* Catlett, 12 Leigh, 383. See, in the same State, a suit on an indemnity against injury to a mill-dam. Chapman *v.* Ross, 12 Leigh (Va.), 565.

jected, or *become liable for*," it was said by the Supreme Court of New York:

"There is no doubt as to the general proposition that, in order to recover upon a *mere bond of indemnity*, actual damage must be shown; if the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment; but if the indemnity be not only against actual damage or expense, but also against *any liability* for damages or expenses, then the party need not wait until he has actually paid such damages, but his right of action is complete when he becomes legally liable for them."

And on the ground that the bond before the court was against *liability*, the plaintiff was allowed to recover.[53] In the case of Spark *v.* Heslop,[54] the defendant, in a letter to the plaintiff requesting him to pay to a banking company for his account a bill of exchange for £400, drawn by one Henderson on and accepted by one Hutchinson, and indorsed by the defendant, and also requesting him to bring an action against Hutchinson for the recovery of the amount and interest, added the following engagement:

"And I hereby agree to be answerable to you for the due payment of the amount of the said bill and interest which you may pay to the said banking company, and for all costs, damages, and expenses which you may *sustain* by reason of such payment and the trying of the said action against the said John Hutchinson, and in any manner relating or incidental thereto, you giving me credit for all money you may receive from the said John Hutchinson in such action."

The plaintiff having brought the action against Hutchinson unsuccessfully, the court distinguished this undertaking from the case of an indemnity, and between "sustaining" costs, damages, and expenses, and paying them. They held that the plaintiff sustained damage when the liability was incurred, and that he could recover the costs he was liable for to his own attorney, although he had not paid them, as well as those of

[53] Chace *v.* Hinman, 8 Wend. (N. Y.) 452, 456, 24 Am. Dec. 39; *In re* Negus, 7 Wend. 499; Webb *v.* Pond, 19 Wend. 423; McGee *v.* Roen, 4 Abb. Pr. 8; Martin *v.* Bolenbaugh, 42 Oh. St. 508.

[54] 1 E. & E. 563.

the defendant in the other suit which he had paid. Accordingly, the plaintiff has recovered the whole amount of a judgment obtained against him, though he has paid nothing on it, when the defendant agreed to indemnify him against liability,[55] against actions, suits, or claims,[56] judgments,[57] debt,[58] or trouble.[59] And where the defendant gave the plaintiff a bond to pay all taxable costs which the plaintiff should "incur and become bound to pay" in a certain suit, it was held that the plaintiff could recover the amount of costs for which judgment had been rendered against him, though he had not paid the judgment.[60]

In an early New York case, where a bond was given "to save harmless and indemnify the plaintiffs *against their liability* as makers of a certain note, and *to pay or cause to be paid* the said note," it was held that the plaintiffs, though they had not paid the note, and were insolvent, were entitled to recover its amount, under the absolute terms of the covenant; but that the plaintiffs could not recover the costs of a suit against them on the note. As to these costs the bond was declared to be purely an agreement to indemnify; and the learned judge (Beardsley) proceeded to say: "Notwithstanding what is said in the case of Chace *v.* Hinman, I must say that I am not aware of any distinction at common law between an indemnity

[55] *Alabama:* Kirksey *v.* Friend, 48 Ala. 276.

Nevada: Jones *v.* Childs, 8 Nev. 121.

New York: Merchants' & Manufs. Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173; Wright *v.* Chapin, 87 Hun, 144; Miller *v.* Miller Knitting Co., 23 Misc. 404, 52 N. Y. Supp. 184.

The plaintiff indemnified against a liability on a steamboat, was one of several co-owners; he paid the entire debts. It was held that he could recover only his share of the debts unless the other owners were insolvent. Ewing *v.* Reilly, 34 Mo. 113.

[56] *Massachusetts:* Cook *v.* Merrifield, 139 Mass. 139.

New York: Conkey *v.* Hopkins, 17 Johns. (N. Y.) 113.

England: Warwick *v.* Richardson, 10 M. & W. 284.

Canada: Smith *v.* Teer, 21 Up. Can. Q. B. 412.

In Kansas City, M. & B. R. R. *v.* Southern Ry. News Co., 151 Mo. 373, 390, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380, where judgment by consent was suffered on the claim, it was held that the plaintiff had the burden of proving the judgment reasonable in amount. If the judgment had not been by consent, the amount of it would have been conclusive.

[57] *New York:* Conner *v.* Reeves, 103 N. Y. 527.

Ohio: Martin *v.* Bolenbaugh, 42 Oh. St. 508.

[58] Carman *v.* Noble, 9 Pa. 366.

[59] Fish *v.* Dana, 10 Mass. 46.

[60] Jarvis *v.* Sewall, 40 Barb. (N. Y.), 449.

against damage and one against liability, which warrants a recovery on the latter on simply showing the fact of liability. In both, as I think, there must be evidence of actual damage, by the payment of money or otherwise."[61] But the rule laid down here seems to be overruled by the later decisions.

§ 796. Payment.

As we have seen, * the general rule is that the surety cannot proceed against his principal debtor until he has paid the debt; it still remains to be seen what in judgment of law is considered as payment. The suit of the surety against the principal is at common law an action of assumpsit, sometimes special, but frequently on the common counts for money paid for the defendant's use; and we now proceed to determine what proofs will satisfy the allegation of payment.[62]

It will be perceived at once that this inquiry involves various questions, some of a technical character, and springing from the form of the action, others relating to the substantial rights of the parties. Is the payment of *money* in all cases necessary? Can the surety, by giving his bond or note in payment of the original debt, raise a claim against the principal? Will the transfer of land, whether by mortgage or deed, be treated as payment? and if so, at what value shall it be computed? These, and similar inquiries, are often complicated and perplexing.

The rule appears to be well settled in this country, though far from being clear in England, that the giving by the surety of his negotiable promissory note, which is received not collat-

[61] Churchill *v.* Hunt, 3 Denio (N. Y.), 321.

[62] "It is an equitable principle of every general application," says Mr. Chancellor Walworth, in Hunt *v.* Amidon, 4 Hill, 345, 348, "that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the Court of Chancery, and substituted the equitable remedy of an action of assumpsit on the common money counts for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out, and expended for his use and benefit."

erally, but as actual payment of the original debt, will be held to be payment as against the principal debtor, and that the surety may at once proceed against him for the amount of his note; in other words, the note is treated as money. While on the other hand, it is also held that the giving a bond will not have the like effect, and that, until the payment of the bond, the surety has no claim against his principal.

It is also well settled, that an absolute conveyance of the land by the surety will be sufficient to raise a claim on his behalf against the principal to its full value, and that it will be treated as money paid for the use of the original debtor. An examination of the decisions will best elucidate these rules.

In an early case in the King's Bench,[63] an application was made to discharge the defendant from custody on filing common bail; and it appeared that the defendant being indebted to one Creswell, the plaintiff Taylor had given Creswell *a bond* and warrant of attorney, and paid him £7 or £8 of costs; that this security was accepted as payment and satisfaction of the debt; and it was contended that this was the same as if the debt had been paid in money. But Lord Ellenborough said: "There is no pretence for considering the giving of this new security as so much *money paid* for the defendant's use;" and the rule to discharge the defendant from custody was made absolute.[64]

On the authority of this case the same point has been decided in New York.[65] The plaintiffs being accommodation indorsers for the defendant, had, on being sued, executed to the holders of the accommodation paper, on the 15th April, 1807, two bonds, one payable in eighteen months and the other in two years, which bonds had not been paid. The plaintiffs, subsequently, were discharged under the insolvent act. The judge charged that the two bonds amounted in law to the payment of the notes, but the jury found a verdict for the defendants. On the motion for a new trial, the court said: "The question is whether giving a bond, in discharge of the

[63] Taylor *v.* Higgins, 3 East, 160.

[64] No attenton appears to have been paid to the payment of the costs. This case was sustained in Maxwell *v.* Jameson, 2 B. & Ald. 51, noticed more fully hereafter.

[65] Cumming *v.* Hackley, 8 Johns. 202.

liability of the plaintiffs, is to be considered as a payment of money. . . . . An obligation to pay is not the same thing as the actual payment. A bond has no analogy to cash. . . . . The technical rule operates with perfect justice in this case; for the bond has not, and never will be paid, as the plaintiffs have since been discharged under the insolvent act; and if the money now demanded was to be recovered, their estate would receive it without ever having given an equivalent."

The motion for a new trial was denied.

The rule laid down in this case appears to be the same where a mortgage is given. So where an accommodation indorser gave a mortgage to secure his debt, and subsequently released the equity of redemption, and made a conveyance of the land, the case of Cumming *v.* Hackley was cited with approbation; and it was held that though the conveyance gave a right of action, the mortgage furnished no basis of claim.[66] ** Where a surety on administrator's bond himself became administrator on the resignation of the defendant, and included the balance due from the defendant in his inventory, it was held that this was a payment of the debt and he might recover from the principal.[67]

§ 797. Payment by note.

* A different rule has been adopted, where the payment, if such it can be called, is made by giving a note. Where the plaintiff became security for the defendant's subscription to a brewers' benefit club, the club called on the plaintiff, and he gave his note for the amount of the subscription.[68] On the trial of the cause, it being an action of assumpsit for money paid, and the objection being taken that the giving a note was no payment, Lord Kenyon held: "That the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; and so the action

[66] Ainslie *v.* Wilson, 7 Cow. 662.

[67] Hazelton *v.* Valentine, 113 Mass. 472.

[68] Barclay *v.* Gooch, 2 Esp. 571. This case was referred to by the court, in Taylor *v.* Higgins, 3 East, 169; but Lord Ellenborough did not commit himself to the correctness of the decision. "*Supposing*, even," he says, "the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still," etc.

was maintainable." It is added, that at the next term a new trial was moved for; but the court agreeing with his lordship, the rule was refused.

This authority was much shaken by a subsequent case.[69] It was an action for contribution. The plaintiffs and defendants united in a promissory note to Batson & Co.; Maxwell took up the note, by giving his own bond to Batson & Co. for the amount. No money was paid. On this state of facts Maxwell sued Jameson in *assumpsit for money paid.*** The court held that since there had been no discharge of the note, and no money had yet come out of the plaintiff's pocket, the action could not be maintained.

These cases leave the rule in England in a very unsettled state.[70]

* In this country, however, the original decision of Barclay *v.* Gooch has been followed, both in New York and Massachusetts. In a case already cited,[71] the case of Barclay *v.* Gooch was referred to by the Supreme Court of New York, with a qualified approbation. "There are some cases," they say, "in which the giving negotiable paper has been held equivalent to the payment of money; and there may be some reason for this distinction (*i. e.*, between bonds and notes), for otherwise a party may be obliged to pay a debt twice, if the paper should pass into the hands of an innocent indorsee."

The precise point came up subsequently for adjudication in an action of assumpsit for money paid.[72] The plaintiff became surety for the defendants in a promissory note to one Vanderlyn, on which judgment was recovered. The plaintiff thereupon gave his negotiable note for the amount of the judgment. This had been accepted by Vanderlyn in full satisfaction, but it remained unpaid. The judge having charged in favor of the plaintiff's right to recover, and a verdict being obtained, a motion was made for a new trial; but this was refused by the court.

[69] Maxwell *v.* Jameson, 2 B. & Ald. 51.

[70] In McVicar *v.* Royce, 17 Up. Can. Q. B. 529, it was attempted to reconcile these cases upon the ground that in the two latter it did not appear that the obligation of the surety was taken in payment.

[71] Cumming *v.* Hackley, 8 Johns. 202.

[72] Witherby *v.* Mann, 11 Johns. 518. See also Beardsley *v.* Root, 11 Johns. 464, 6 Am. Dec. 386.

In another case [73] which came up on error from the New York Common Pleas, Hedden, the plaintiff below, by way of accommodation for Rodman indorsed a note on the 30th of August, 1819, for $118, payable in sixty days. In July, 1820, a judgment was obtained against Hedden, as indorser, by one Jacot; in October, 1820, Hedden paid $20 on account of this judgment; on the 26th of May, 1821, $100 more, and gave his note for $28.10, which was accepted by Jacot in full payment and satisfaction of the judgment. The note for $28.10 was paid by Hedden on the 28th of July, 1821, previous to which (on the 25th of July, 1821), Rodman had left the State of New York, and did not return till 1830, when the suit was brought. The note for $28.10 was thus given and accepted in satisfaction *before* the defendant, Rodman, left the State, but not paid till *after* his departure. The defendant set up the statute of limitations, insisting that the plaintiff's cause of action accrued when the original notes made by Rodman with Hedden's indorsement came to maturity, and that, as the defendant was then in the State, the statute had attached, and the claim was consequently barred. This defence was unsuccessful in the Common Pleas, and the plaintiff had a verdict and judgment; to reverse which, error was brought, and the judgment was reversed.[74] So where agreements had been given by the defendants as principals, to pay or save harmless, and the plaintiffs as sureties, after verdict, had given their negotiable note for the debts and costs, it was held that the verdict was evidence against the principals, though without notice, and that the negotiable note, given and accepted in full satisfaction and discharge, was equivalent to the payment of cash; the court adding: "So it would now probably be holden of a note not negotiable." [75] And the rule appears to be the same in Massachusetts.[76] **

[73] Rodman *v.* Hedden, 10 Wend. 498.

[74] This is a hard case, and evinces a determination to carry the rule to its greatest extent. And it is to be noticed that the judgment was reversed on a ground that by the report does not appear to have been taken at all at the trial. The defendant there insisted that the plaintiff's cause of action accrued when the original notes set forth in the declaration came to maturity—*i. e.*, Nov., 1819, and April, 1820. The court, however, disregarding this line of defence, decided that the cause of action accrued on the acceptance of the note by Jacot—*i. e.*, 28th of May, 1821—which point does not appear to have been raised below.

[75] Lee *v.* Clark, 1 Hill, 56.

[76] Cornwall *v.* Gould, 4 Pick. 444;

The rule thus established is almost universally followed in this country,[77] and it is held that where a surety pays the debt

Doolittle *v.* Dwight, 2 Met. 561. So in England: Drake *v.* Mitchell, 3 East, 251.

[77] It is proper to notice that the American rule, as applicable to negotiable paper—*i. e.*, that when given by a surety or secondary debtor, and accepted by the creditor in full satisfaction of his demand, it gives at once a right of action against the principal debtor—is also the rule of the civil law.

La caution, says Pothier, in his *Traité des Obligations*, part ii, ch. 6, section 7, art. 1, §§ 1 & 2, ed. of 1781, vol. 1, 212, *a recours contre le débiteur principal après qu'elle a payé.—Il y a même des cas auxquels la caution a action contre le débiteur principal, même avant qu'elle ait payé;* and again, *Il n'importe que le paiement ait été une paiment réel, ou une compensation, ou une novation* This term, *novation*, is defined by Crivelli: *de novatio, convention nouvelle. On appelle de ce nom, en termes de droit, le changement d'un contrat en une autre, et par lequel il est derogué au premier. Dictionnaire du Droit Civil, in voc.* All the cases which we have just examined in the text, where bonds or notes were given to extinguish prior obligations, would, according to the civil or French law, be novations. *En tous ces cas,* continues Pothier, *la caution a droit de demander que le débiteur principal la rembourse, soit de la somme qu'elle a payée, soit de celle qu'elle a compensée, soit de celle qu'elle s'est obligée de payer pour éteindre l'obligation du principal débiteur.*

The French Code also recognizes the right of the surety to proceed against the debtor before payment, and carefully defines the cases in which it is to be exercised. The provisions are as follows:

Art. 2028. *La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu débiteur.* Art. 2032. *La caution même avant d'avoir payé put agir contre le débiteur pour être par lui indemnisée.*

1. *Lorsqu'elle est poursuivie en justice pour le paiement.*

2. *Lorsque le débiteur a fait faillite, ou est en déconfituse.*

3. *Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps.*

4. *Lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avait été contractée.*

5. *Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'échéance, à moins que l'obligation principale, telle qu'une tutelle, ne soit de nature à pouvoir être éteinte avant un temps détermine.*

It is to be borne in mind, however, that the courts of France follow the course of the civil law, and that there is no division of jurisdictions.

The enumeration of *cautions* under the French Code is not confined to the mere money paid. 2028. *La caution a aussi recours pour les dommages et intérêts, s'il a lieu.*

L'engagement des débiteurs envers leurs cautions n'est pas compris, says Toullier, *sous la règle* (1153); *car ce n'est pas de l'argent que les débiteurs doivent à leurs cautions: ils doivent les indemniser des dommages qu'elles pourront suffrir de la part du créancier qui n'est pas payé, comme s'il fait saisir leurs biens. Ainsi, l'indemnité que le débiteur doit à sa caution l'oblige, sans qu'il soit besoin de stipulation aux dommages et intérêts qui resulteraient de la saisse et vente des biens de la caution.* Toullier, vol. 6, 280, *des Contrats.*

This would not be so with us, as has already been said, unless the surety held a contract to indemnify and save

of his principal with his own negotiable note, *which is received in satisfaction of the debt*, he may sue at once and recover the amount of his note of the principal,[78] or contribution from a co-surety.[79]

§ 798. Note must be accepted as payment.

* It is to be borne in mind, however, in all these cases, that it is essential that the note should be given and accepted by the creditor as full payment and in complete satisfaction.[80] This has been repeatedly decided. So where an action of covenant was brought [81] by plaintiffs, who had sold the defendants certain coal mines, for which they covenanted to pay a sum certain in instalments, the defendants pleaded payment of part, and a bill of exchange given for *payment and in satisfaction* of the residue on which judgment had been recovered, and to this plea the plaintiff demurred; it was held bad, because it was not averred that *the bill was accepted in satisfaction, nor that it had produced it;* that, not having been accepted as satisfaction for the debt, the bill could only operate as a collateral security; and that, therefore, the plaintiff might resort to his original

him harmless. In the case of a suretyship arising by implication, or without a contract to indemnify, the recovery is limited strictly to the money paid for the use of the principal.

[78] *Arkansas:* Bone *v.* Torry, 16 Ark. 83.

Georgia: Mims *v.* McDowell, 4 Ga. 182, 48 Am. Dec. 221.

Indiana: White *v.* Miller, 47 Ind. 385; (but see Romine *v.* Romine, 59 Ind. 351).

Kansas: Rizer *v.* Callen, 27 Kan. 339.

New Hampshire: Pearson *v.* Parker, 3 N. H. 366.

New York: Elwood *v.* Deifendorf, 5 Barb. 398, 410.

South Carolina: Peters *v.* Barnhill, 1 Hill, 234.

Contra, North Carolina: Brisendine *v.* Martin, 1 Ired. L. 286.

[79] *Alabama:* Pinkston *v.* Taliaferro, 9 Ala. 547.

Arkansas: Anthony *v.* Percifull, 8 Ark. 494.

California: Stone *v.* Hammell, 83 Cal. 547, 23 Pac. 703, 17 Am. St. Rep. 272, 8 L. R. A. 425 (*semble*).

Illinois: Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Indiana: Keller *v.* Boatman, 49 Ind. 104; White *v.* Carlton, 52 Ind. 371.

Kentucky: Robertson *v.* Maxcey, 6 Dana, 101; Stubbins *v.* Mitchell, 82 Ky. 535.

Missouri: Ryan *v.* Krusor, 76 Mo. App. 496.

Contra, North Carolina: Brisendine *v.* Martin, 1 Ired. L. 286; Nowland *v.* Martin, 1 Ired. L. 307.

In Bell *v.* Boyd, 76 Tex. 133, 13 S. W. 232, contribution was refused where the new note was that of the principal and surety; but the general rule was recognized.

[80] White *v.* Miller, 47 Ind. 385.

[81] Drake *v.* Mitchell, 3 East, 251.

remedy on the covenant; and, said Le Blanc, J.: "The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment." The principle of this case has been repeatedly recognized in New York,[82] where it is held that a note is not payment of a precedent debt, unless there is an express agreement to receive it as payment.[83]

In another case, in New York,[84] the doctrine that negotiable notes are to be considered as money, has been restricted to cases where the notes have been parted with to *bona fide* holders for value. The plaintiff, Reed, bought of the defendants a threshing-machine, and gave three negotiable notes of $200 each for the purchase-money. The machine proving worthless, the plaintiff brought an action for *money paid* against the defendants. A verdict was obtained, but it was set aside and a new trial granted, the court, by Savage, C. J., saying: "Had the notes in question been given to a third person in payment and discharge of a debt due by the defendants to such third person, then the case would have come within previous decisions. But I cannot find that the giving a note ever has been considered, as between maker and payee, the payment of money by the former to the latter. In my judgment, the mere giving a note cannot be considered payment of the very money for

[82] Witherby *v.* Mann, 11 Johns. 518; Tobey *v.* Barber, 5 Johns. 68, 4 Am. Dec. 326; Johnson *v.* Weed, 9 Johns. 310, 6 Am. Dec. 279.

[83] In Massachusetts it would seem that, in some cases, this express agreement is inferred from the mere fact of giving a negotiable note.

The giving a negotiable note for a debt on a simple contract raises a legal presumption that the note was received in payment, and will operate as a discharge of the simple contract, unless the presumption be controlled by evidence of a contrary intent. Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Maneely *v.* M'Gee, 6 Mass. 143, 4 Am. Dec. 105; Huse *v.* Alexander, 2 Met. 157. So, also, in that State it is held, in an action by the indorsee against the maker of a negotiable note, indorsed when overdue, that a negotiable note made to the defendant by the payee, intended as a payment of the note, may be shown in defence as a set-off. Holland *v.* Makepeace, 8 Mass. 418, 5 Am. Dec. 107; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409. "A negotiable promissory note, by the common law of this State, is holden to be a discharge of a simple contract on which it is founded." Emerson *v.* Prov. H. M. Co., 12 Mass. 237.

[84] Van Ostrand *v.* Reed, 1 Wend. 424, 430.

which such note is given as security, so as to justify a recovery of it by the maker against the payee."

In a more recent action, in the same State, where the facts hypothetically put by the court in the case last cited, were actually presented, the notes having been transferred to a *bona fide* holder for value, the plaintiff was held entitled to recover as for money paid and received.[85] **

§ 799. Payment by bond or non-negotiable note.

It is held in some jurisdictions that payment by any obligation of the surety other than a negotiable promissory note, though accepted in satisfaction of the debt, will not give an immediate right of action to the surety;[86] and the attempt is made to reconcile the English cases upon this distinction. Most of the cases recognize no such distinction; and in some cases it is expressly denied.[87] There seems no foundation for it, and it indeed appears to have arisen from the form of action brought by the surety. The action was usually brought on a count for money paid, and the courts making the distinction were averse to allowing that count to lie when neither money nor a negotiable note had been given. It is needless to say that a distinction founded entirely upon the form of action should not be supported at the present time. The cases allowing an action where payment has been made by the property of the surety, now to be considered, seem opposed to it.

§ 800. Payment in land or goods.

* It remains to be seen how far the conveyance or transfer of land or other property in discharge of a pecuniary liability furnishes the surety an action against his principal.

In an action of assumpsit for money paid,[88] the defendant, on the 12th of April, 1817, obtained from the plaintiffs their indorsement on two notes, each for $2,059.35. The notes were

[85] Colville *v.* Besly, 2 Denio, 139.

[86] *Indiana:* Bennett *v.* Buchanan, 3 Ind. 47.

Pennsylvania: Morrison *v.* Berkey, 7 S. & R. 238.

South Carolina: Peters *v.* Barnhill, 1 Hill, 237.

Texas: Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

[87] *Kentucky:* Robertson *v.* Maxcey, 6 Dana, 101.

Canada: McVicar *v.* Royce, 17 Up. Can. Q. B. 529.

[88] Ainslie *v.* Wilson, 7 Cow. 662, 668.

indorsed to John B. Murray & Son, then again indorsed over, and paid by the subsequent indorser. The plaintiffs executed to the Murrays a mortgage on four lots (subject to a previous mortgage for $1,770), as a security for the indorsements, and subsequently released the equity of redemption to the Murrays, who received the release as payment of $1,200 on the plaintiffs' indorsement, and discharged them from all further liability as indorsers. Evidence was taken as to the value of the lots, and the jury found for the plaintiffs $804.45. On a motion for a new trial, it was contended that the conveyance of land would not sustain an action for money paid; but the court, after deciding that under Cumming *v.* Hackley,[89] and Taylor *v.* Higgins,[90] the mortgage was no payment, used this language, as to the release of the equity of redemption: "We have no doubt that, as the conveyance of the land was received in discharge of a money debt due from the plaintiff, it is in judgment of law to be considered the same thing as if the plaintiff had actually paid money. The Murrays received it as money, or an equivalent for money. They had the right of electing. To the defendant it was immaterial whether the payment was made in one way or the other." And a new trial was denied. This case, however, leaves the question open as to the rate at which land under such circumstances is to be taken. The court say: "There is some question whether the equity of redemption, taken subject to the previous mortgage, was equal in value to the $1,200. The jury found $804.45 only; and, from the evidence, we think they were warranted in finding that amount." This would seem to imply that the actual and not the agreed value of the land is to be the guide. Nor does the question appear to have been raised how far the maker and principal debtor, Wilson, the defendant, was benefited by this transaction. The court say, that on the conveyance of the land at the agreed valuation of $1,200, and the release of the plaintiff, Ainslie, "the remainder due on the notes constituted a valid claim in favor of the Murrays, against Wilson, the maker." But is it clear that the claim of the Murrays as against Wilson was good for *only* the remainder? If the Murrays had sued Wilson on the note, what, as between them, would have been

[89] 8 Johns. 202.

[90] 3 East, 169.

the measure of damages? Could, in such an action, Wilson have had the benefit of the valuation of the land at $1,200 to which he was not privy? As between the Murrays and Wilson, was the land satisfaction for anything more than it was actually worth? What if it had been foreclosed under the first mortgage, and no surplus realized, would Wilson have still had the benefit of the $1,200 agreement?

In a subsequent case,[91] where the plaintiff, an accommodation maker, had paid the defendant's debt, after judgment recovered for $401.61, by a conveyance of land for a consideration expressed in the deed of $548.31, it was held, after affirming the main point decided in the last case, that the defendant was at liberty to reduce the amount of the recovery by showing that the land conveyed in satisfaction of the judgment was not of value equal to the amount of the note and interest; and this evidence having been excluded at the circuit, a new trial was ordered.** So where the land of the surety was sold on execution by the creditor, he may maintain an action;[92] and the same was held where a mortgage of the surety's land was accepted as payment.[93]

The same doctrine has been declared in Massachusetts. So under a plea of payment in an action of debt on judgment, the defendant is not confined to evidence of payment in money, but he may show that a chattel or deed of land was given and received in satisfaction of the judgment. He must, however, prove that the thing received was of the full value of the debt, or that it was agreed to be received as such.[94] So where the promissory note of a third party was indorsed by the surety and received by the creditor in payment of the debt, the surety may at once maintain an action,[95] and the same is true where a note and mortgage of a third party is transferred by the surety to the creditor in payment.[96] But taking possession of a mortgaged estate for the purpose of foreclosure, does not operate

[91] Bonney *v.* Seely, 2 Wend. 481.

[92] Lord *v.* Staples, 23 N. H. 448.

[93] McVicar *v.* Royce, 17 Up. Can. Q. B. 529.

[94] Howe *v.* Mackay, 5 Pick. 44; and the same rule was laid down in President of Newburyport Bank *v.* Stone, 13 Pick. 420.

[95] Hommell *v.* Gamewell, 5 Blackf. (Ind.) 5.

[96] Fahey *v.* Frawley, 26 L. R. Ir. 78.

as a payment of the mortgage money; for the land still remains only a security for the money.[97]

§ 801. Compensation for actual loss only.

In contracts of indemnity as elsewhere the ordinary rule is that actual compensation can only be given for actual loss,[98] and that a surety who pays the debt of his principal for less than its face can recover only the amount he paid.[99] And where the plaintiffs had sold the defendants three-sixteenths of a steamboat, the rest of which was owned by third parties, taking from the defendants an agreement to indemnify them against "all liability of loss" on account of the debts of the boat, it was held, in an action brought by the plaintiffs to recover the amount of a judgment against them for a debt of the boat, that they could not recover more than three-sixteenths of it until they had shown that they could not compel the other part owners, because of insolvency or for some other good cause, to contribute their proportion.[100] So in an action by a sheriff against a surety in an indemnity bond given on an attachment, he is entitled to recover the whole amount of costs paid by him in the successful defense of an action brought against him by a claimant of the goods attached, and not merely a proportionate share, though other creditors who did not indemnify received the surplus proceeds of the goods attached after satisfying the indemnifying creditors.[101] And

[97] West *v.* Chamberlin, 8 Pick. (Mass.) 336.

[98] See Willson *v.* McEvoy, 25 Cal. 169, where the cases are reviewed, and the principle above stated approved.

[99] *Illinois:* Coggeshall *v.* Ruggles, 62 Ill. 401 (*semble*).

Indiana: Gieseke *v.* Johnson, 115 Ind. 308, 17 N. E. 573; Goodwin *v.* Davis, 15 Ind. App. 120, 43 N. E. 881.

Louisiana: Pickett *v.* Bates, 3 La. Ann. 627.

Maryland: Martindale *v.* Brock, 41 Md. 571.

Nebraska: Eaton *v.* Lambert, 1 Neb. 339.

New Jersey: Delaware, L. & W. R. R. *v.* Oxford Iron Co., 38 N. J. Eq. 151.

New York: Cobb *v.* Titus, 10 N. Y. 198.

Virginia: Blow *v.* Maynard, 2 Leigh, 29.

England: Ex parte Rushforth, 10 Ves. 409; Butcher *v.* Churchill, 14 Ves. 567; Reed *v.* Norris, 2 My. & Cr. 361.

But see *contra*, Fowler *v.* Strickland, 107 Mass. 552, where an accommodation indorser having taken up a note for half its value was allowed to recover the face value from the maker. The attention of the court does not seem to have been called to the fact that the indorser was a surety.

[100] Ewing *v.* Reilly, 34 Mo. 113.

[101] Chamberlain *v.* Bellar, 18 N. Y. 115, 72 Am. Dec. 498.

upon the same principle it is held that a surety who has paid the principal's debt in depreciated currency can only recover the value at the time of the payment, with interest.[102] And a surety to a bond indemnifying a sheriff from damage can show that he received a certain sum as proceeds of the sale.[103] Where both principal and surety were sued, and judgment recovered, which the surety paid, the principal cannot claim a reduction in the amount to be repaid to the surety on the ground that usurious interest was included in the judgment.[104] But if the surety knew, or should have known, that the claim was usurious, or that the principal was not bound to pay so much, his recovery will be reduced by the amount he ought not to have paid.[105]

§ 802. Judgment against surety often conclusive on principal.

* It has been sometimes held that the record of judgment against the surety is conclusive evidence against his principal, and fixes the amount of recovery. So in an action by the sheriff against the sureties in a bond to the jail liberties, it was held that the sheriff, having given notice to the defendants of the escape suit against himself, and they having thereupon assisted in its defense, the record of the recovery in that suit was conclusive evidence that the plaintiff had been damnified to the

[102] *Arkansas:* Jordan *v.* Adams, 7 Ark. 348.

Kentucky: Miles *v.* Bacon, 4 J. J. Marsh, 457; Crozier *v.* Grayson, 4 J. J. Marsh, 514.

Maryland: Gillespie *v.* Creswell, 12 G. & J. 36.

Virginia: Kendrick *v.* Forney, 22 Gratt. 748.

West Virginia: Butler *v.* Butler, 8 W. Va. 674; Feamster *v.* Withrow, 9 W. Va. 296.

In Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641, the surety paid a claim of the principal with certificates of deposit in a bank which were worth less than par, under an agreement with the principal that he would pay the face of the deposits. It was held that, while usually a surety can recover no more than the value he paid, yet where there is an express agreement by the principal, as here, he may recover the greater amount.

[103] O'Brien *v.* McCann, 58 N. Y. 373.

[104] *Michigan:* Thurston *v.* Prentiss, 1 Mich. 193.

Tennessee: Wade *v.* Green, 3 Humph. 547.

[105] *Georgia:* Jones *v.* Joyner, 8 Ga. 562 (*semble*).

Kentucky: Lucking *v.* Gegg, 12 Bush. 298.

South Carolina: Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559.

extent of the judgment.[106] So again, in an action by overseers of the poor on an order of bastardy to recover against the putative father the weekly sum directed to be paid for the maintenance of the child, the order was held to be *prima facie* evidence of the demand, and that it rested with the defendant to show himself exonerated from the payment in order to avoid the recovery.[107]

On this subject a few observations may be permitted. A judgment against the surety may, upon the ground of privity, be proper evidence against the principal, and *vice versa;* but it is manifest that the record can only be evidence of the facts which it declares and that payment is not one of these. The judgment, though perhaps conclusive evidence of the debt being incurred, is no proof whatever that that debt has been paid, or that it ever will be.[108] **

The principle that it is conclusive evidence of the amount of the debt is illustrated by the following cases: In Hare *v.* Grant,[109] the judgment procured against a surety was held conclusive where the surety notified the principal of the action. Where the defendant had failed to carry out, as he had agreed to do, the plaintiff's contracts with a third party, it was held

[106] Kip *v.* Brigham, 7 Johns. 168.

[107] Wallsworth *v.* Mead, 9 Johns. 367. "A judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity." Clark *v.* Carrington, 7 Cranch, 308, 322, 3 L. ed. 354. "When one is responsible by force of law, or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other." Lowell *v.* Parker, 10 Met. 309, 43 Am. Dec. 436. See also Heard *v.* Lodge, 20 Pick. 53, 32 Am. Dec. 197; Train *v.* Gold, 5 Pick. 380; Foxcroft *v.* Nevens, 4 Me. 72; Hayes *v.* Seaver, 7 Me. 237. In Vermont, if one promise to indemnify another for all damage, etc., which he shall incur in giving up to the promisor a certain horse, and in bringing a suit against the vendor thereof, for fraudulently selling a horse belonging to another, if he fail therein,—if the suit is brought, and the plaintiff defeated, the record of the judgment is competent evidence in a suit against the promisor founded on the promise, so far as to show the bringing and failure of the action; and this, though notice of the bringing of the suit was given to the defendant. But the amount of damages depends on the title to the horse; and as to this the judgment is not evidence. Lincoln *v.* Blanchard, 17 Vt. 464.

[108] Lyon *v.* Northup, 17 Iowa, 314.

[109] 77 N. C. 203.

that the plaintiff could recover the amount recovered by the third party against him.[110] Where a contractor to lay pipes for a town had agreed to be liable for any damages occurring through his neglect, it was held, in Campbell *v.* Somerville,[111] that the amount of his liability for a personal injury suffered by a third party, was conclusively determined by the judgment recovered against the town by that third party, where the plaintiff himself had defended the action with the town. Where defendant insured goods, making itself liable for the government tax, as well as for the value of the goods, the judgment of the government recovered against the assured was held to determine the amount of the defendant's liability.[112] Where a sheriff levied wrongfully on property, owing to misrepresentations of the defendants, the defendants were held liable for the amount of the judgment recovered against the sheriff by the owner.[113] In this case it appeared that the defendants had taken part in the defence of the action by the owner against the sheriff. Norfolk *v.* American Steam Gas Co.[114] was a bill in equity brought against the officers of a company, that company having failed to pay a judgment obtained against it as trustee in trustee process. It was held that the plaintiff could recover the amount of the judgment obtained against the company. Where a defendant had made excavations in a sidewalk, by which a person was injured, and the plaintiff (a city) was held liable, the plaintiff was allowed to recover the amount of the judgment obtained against it.[115] Where a sheriff sued for the act of his deputy, who had notice of the suit, the judgment fixes the measure of damages in an action by the sheriff on the deputy's bond.[116]

§ 803. Litigation expenses.

* Having thus examined the rules requiring the surety to pay before he proceeds against his principal, and also discussed the questions that present themselves as to the mode of payment, we have now to examine those cases where the surety

[110] Dubois *v.* Hermance, 56 N. Y. 673.

[111] 114 Mass. 334.

[112] Insurance Companies *v.* Thompson, 95 U. S. 547, 24 L. ed. 487.

[113] Kenyon *v.* Woodruff, 33 Mich. 310.

[114] 108 Mass. 404.

[115] Ottumwa *v.* Parks, 43 Ia. 119.

[116] Kettle *v.* Lipe, 6 Barb. 467.

is obliged to pay under compulsion of law, or where, by reason of his engagement, he is put to indirect or consequential loss. Where the surety is compelled by suit to pay the debt for which his principal is previously liable, or where a party holding an indemnity against a claim is obliged by legal proceedings to pay the demand in the first instance, the general rule is that he can recover against the principal or indemnitor, not only the amount which he has been obliged to pay, but also his costs incurred in defending the action; [117] ** and also his counsel fees and expenses, at least where he has an express contract of indemnity.[118] * A party who makes, accepts, or indorses an accommodation note or bill for the accommodation of a party thereto, is regarded as a surety, and can charge such party with the costs of a suit for the collection of the note which he may have been compelled to pay.[119] So it has been held, as between the accommodation acceptor of a bill and the drawer; [120] the accommodation indorser of a promissory note, and the maker; [121] as between the indorser of a note com-

[117] *Colorado:* Watson *v.* Hahn, 1 Col. 385.

Indiana: Keesling *v.* Frazier, 119 Ind. 185.

Maine: Nutt *v.* Merrill, 40 Me. 237; Ripley *v.* Mosely, 57 Me. 76.

Massachusetts: Lindsey *v.* Parker, 142 Mass. 582, 56 Am. Rep. 709.

Michigan: Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123.

Mississippi: Whitworth *v.* Tilman, 40 Miss. 76.

New Jersey: Apgar *v.* Hiler, 24 N. J. L. 812.

New York: Thompson *v.* Taylor, 11 Hun, 274.

North Carolina: Atlantic & N. C. R. R. *v.* Atlantic & N. C. Co., 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223.

Ohio: Finckh *v.* Evers, 25 Oh. St. 82.

Texas: Bennett *v.* Dowling, 22 Tex. 660.

Vermont: Downer *v.* Baxter, 30 Vt. 467.

England: Smith *v.* Howell, 6 Ex. 730; Howard *v.* Lovegrove, L. R. 6 Ex. 43.

Canada: Spence *v.* Hector, 24 Up. Can. Q. B. 277.

But see *Kentucky:* Gaines *v.* Poor, 3 Met. 503, 79 Am. Dec. 559.

[118] *Maine:* Ripley *v.* Mosely, 57 Me. 76.

Massachusetts: Lindsey *v.* Parker, 142 Mass. 582, 56 Am. Rep. 709.

Ohio: Finckh *v.* Evers, 25 Oh. St. 82.

England: Howard *v.* Lovegrove, L. R. 6 Ex. 43.

[119] Baker *v.* Martin, 3 Barb. 634.

[120] Jones *v.* Brooke, 4 Taunt. 464.

[121] Hubbly *v.* Brown, 16 Johns. 70. But an indorser of a regular bill of exchange who has been sued by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. There is no privity between them. Dawson *v.* Morgan, 9 B. & C. 618; King *v.* Phillips, Peters C. C. 350. Nor is the maker liable to pay the indorser his costs if he is sued. "The mere fact of drawing the note does not

pelled to pay, and a party who had agreed to indemnify him on his indorsements.[122] **

A surety is not liable for the costs of a suit against the principal.[123] But where a defendant guarantees the *collection* of a note, he is liable for the costs of an action against the maker.[124] On a bond to indemnify the plaintiff against all costs and claims on account of doing some act, the plaintiff may recover the expense of an unfounded suit brought against him.[125]

§ 804. None where suit was unnecessary.

* We have already had occasion to consider this question in regard to warranties; and it would seem that the liability for costs should depend on the grounds of the original litigation, and the notice given to the party sought to be charged with the costs. It would certainly be inequitable that a party should be obliged to defray the expense of a controversy, either unnecessary in itself, or which he might not have chosen to incur.[126] "No person," says Lord Chief-Justice Denman,[127] "has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend." In this case, the defendant, as lessee of a certain house, had covenanted with his lessor to put and keep the premises in repair, under penalty of forfeiture, and in his assignment to the plaintiff had covenanted that all the cove-

imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser." Simpson *v.* Griffin, 9 Johns. 131.

[122] Mott *v.* Hicks, 1 Cowen, 513.

[123] Woodstock Bank *v.* Downer, 27 Vt. 539.

[124] Mosher *v.* Hotchkiss, 3 Abb. App. 326; Tuton *v.* Thayer, 47 How. Pr. 180.

[125] *Louisiana:* Kern *v.* Creditors, 49 La. Ann. 886, 22 So. 40 (indemnity against attachment on property sold).

New York: Newburgh *v.* Galatian, 4 Cow. 340; Beekman *v.* Van Dolsen, 70 Hun, 288, 24 N. Y. Suppl. 414 (indemnity against former lease); Grant *v.* Lawrence, 79 Hun, 565, 22 N. Y. Supp. 901 (using patented article).

Oregon: Henry *v.* Hand, 36 Ore. 492, 501, 59 Pac. 330 (indemnity against liens.)

Vermont: Chilson *v.* Downer, 27 Vt. 536.

Contra, District of Columbia: Donovan *v.* Johnson, 13 D. C. App. Cas. 356.

And see *Massachusetts:* Whiting *v.* Aldrich, 117 Mass. 582.

[126] *California:* March *v.* Barnet, 114 Cal. 375, 46 Pac. 152 (expense resulting from failure to pay judgment).

Connecticut: Redfield *v.* Haight, 27 Conn. 31.

Mississippi: Whitworth *v.* Tilman, 40 Miss. 76.

New York: Holmes *v.* Weed, 24 Barb. 546; Hallock *v.* Belcher, 42 Barb. 199.

[127] Short *v.* Kalloway, 11 A. & E. 28.

nants had been performed. The covenants had not been performed; the lease had become voidable; and the plaintiff having sub-assigned the lease to one Clark, with a covenant similar to that which he had received from the defendant, was sued by him (Clark), and obliged to pay £120 to settle the demand, together with £119 costs incurred in the defence; and it was held, for the above reason, that these costs could not be recovered over against the defendant. The principle of this decision has been repeatedly affirmed in cases where it has been held that it is not necessary for the surety to stand suit, in order to charge his principal. So in New York, where the defendant gave the plaintiff a promise to indemnify him against an act which proved to be trespass, and the plaintiff being sued for the trespass gave a cognovit, it was held that, it satisfactorily appearing that the cognovit was not for too much, he was entitled to recover the amount of the judgment.[128]

So, in Pennsylvania, it has been held that a surety is not bound to subject himself to costs by waiting till the creditor brings suit; but he may consult his own safety, provided it does not involve a wanton sacrifice of the interests of his principal.[129] So, again, in the same State, it is held that a surety cannot claim reimbursement for expenses unnecessarily incurred.[130] This is in analogy also with the sound rule hereafter to be noticed in regard to real estate—that the vendor who holds a warranty may surrender to a paramount title, thereby only assuming the burden of proof that he did not surrender without just cause.[131] And a very similar decision has been had in England: [132] it was an action on the case for running down a ship, in consequence of which the plaintiffs were obliged to accept the aid of salvors, and were compelled to pay a large sum of money, and certain costs in addition thereto.

[128] Stone *v.* Hooker, 9 Cow. 154.

[129] Craig *v.* Craig, 5 Rawle, 91.

[130] Wynn *v.* Brooke, 5 Rawle, 106.

[131] So in Massachusetts, it has been said on the subject of eviction, "There is no necessity for the party holding a covenant of warranty to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff." Parsons, C. J., in Hamilton *v.* Cutts, 4 Mass. 349, 352, 3 Am. Dec. 223.

[132] Tindall *v.* Bell, 11 M. & W. 228.

It appeared that the plaintiffs, after a negotiation with the salvors, who demanded £150, had tendered £20, and by a decision of the Admiralty were finally obliged to pay £45 damages, and £124 costs. The plaintiffs had a verdict for £45, with liberty to move to increase it by the amount of costs. It was held that it should have been left with the jury to say what a reasonable man would do under similar circumstances; and if the litigation were found to be prudently incurred, then the costs should be allowed; and Parke, B., said: "The parties were in the same situation as if the defendants had entered into a contract with the plaintiffs not to do the wrong complained of. That is not a contract of indemnity." ** Where the sureties on a forthcoming bond refused to pay the amount of the original judgment, and defended an action on the bond, it was held that they could not recover from their principal the costs of the action on the bond.[133]

§ 805. Notice of suit.

* But if the suit be brought against the surety, and there appear good reason to resist the claim, then the further question arises as to notice. Its effect has been thus stated: "The purpose of giving notice is, not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." And in this case it was held that notice was not essential, and that the plaintiff could recover his costs though no notice had been given.[134]

Its operation has been still more clearly defined by Lord Chief-Justice Tenterden, in an action on a breach of the covenant of title: "The only effect of want of notice in such a case as this is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident

[133] Robinson *v.* Sherman, 2 Gratt. (Va.) 178, 44 Am. Dec. 381.

[134] *Per* Buller, J., in Duffield *v.* Scott, 3 T. R. 374.

bargain, and that the defendant might have obtained better terms, if the opportunity had been given him." This was said in a case where the plaintiff had been obliged after suit to settle with a party claiming under title paramount; and the court said: "As to the costs," incurred by the plaintiff in defending the action, "the plaintiff here had a right to claim an indemnity; and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney." [135] It may, therefore, be said that notice in these cases is not necessary; if given, however, and the defendant neither endeavors to arrest the litigation, nor undertakes to direct it, he will be made responsible for its result; [136] while, on the other hand, the only effect of not giving it, is to throw on the plaintiff the burden of showing that the first suit, the costs of which he claims, was not improperly contested.[137]

This view of the matter has been very fully stated by Mr. Justice Story, on the Massachusetts Circuit, and applied to the subject of reinsurance; [138] and the Supreme Court of the United States has declared, that a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity; [139] and the law has been similarly declared in New Hampshire, on a suit upon an execution bond.[140]

To these general rules an exception was taken by Lord Chancellor Hardwicke as to extents. In an early case, where extent was taken out against a surety to the crown, and after contesting it some time, he paid the claim, and prosecuted his

[135] Smith *v.* Compton, 3 B. & A. 407. Dumoulin considers the question of notice at length, and its effect on the expenses, both in the case when notice is given, and when not given; and when given pending the suit; and as to the motives for not giving: §§ 150–153.

[136] *Vermont:* Brown *v.* Haven, 37 Vt. 439.

Canada: Spence *v.* Hector, 24 Up. Can. Q. B. 277.

[137] Mr. Chitty says: "In cases of guarantee, a notice of the claim and action of the creditor against the surety should always be given to the principal, with an intimation (if there be clearly no defence) that the action will be settled unless the party forthwith desire that it be defended; and that he will be looked to for indemnity." Chitty on Contracts, 400; on Guaranties and Indemnities, *in notis*.

[138] N. Y. State Marine Ins. Co. *v.* Protection Insurance Co., 1 Story, 458.

[139] Clark *v.* Carrington, 7 Cranch, 308, 322, 3 L. ed. 354.

[140] French *v.* Parish, 14 N. H. 496.

principal for the amount paid by him, including his expenses, it was insisted that, the debt being a just one, and improperly disputed, the principal should not be charged with the expense of the litigation; but Lord Hardwicke said: "I know of no such distinction"; and then taking notice that an extent is both an action and an execution, and that the surety could not be supposed prepared to pay the claim immediately, he allowed the demand.[141] But the general rule seems well and clearly established, that the principal shall not be subjected to the expense of unnecessary litigation; how the fact is to be arrived at, and on whom the burden of proof lies, will, as has been said, frequently turn on the question of notice. Where bail employed a third party to find the principal debtor, and then, refusing to pay the expenses of the person so employed, was sued and compelled to pay his bill with costs, it was held in a suit against the principal debtor that the bail could recover the sum paid, but not the costs; Lord Ellenborough, at Nisi Prius, saying: "As for the costs of the action which the plaintiff took defence to unadvisedly, he should have either defended that action if the demand was unfounded, or paid the money if it could be legally claimed from him; but having defended that action without foundation, he cannot charge the defendant with the costs incurred in such an improvident defence." [142]

In a case at Nisi Prius, where the plaintiff, an auctioneer, was employed by the defendant to sell an estate, and the title proved defective, the purchaser brought suit against the auctioneer for his deposit; the auctioneer gave notice to the defendant, who refused to defend the suit. The auctioneer then paid the deposit, with the purchaser's costs and his own, and brought suit against the defendant, claiming these costs and the excise duty on the sale. The action was assumpsit for money paid, with the usual money counts, but Lord Ellenborough held that, as to the costs, "there should have been a special count, inasmuch as the right to these costs by the plaintiff was not

[141] *Ex parte* Marshall, 1 Atk. 262.

[142] Fisher *v.* Fallows, 5 Esp. 171. No action will lie by bail for his trouble or loss of time in taking a journey to become bail, because he does not undertake the journey as such, or labor as a person employed by the defendant, but he does it as a friend, and to do him kindness. Reason *v.* Wirdnam, 1 C. & P. 434.

so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent;" and, on the ground that the declaration should have been special, the costs were refused.[143] **

* In a case on a guaranty to indemnify the plaintiff against the expense of a commission of bankruptcy, the messenger had sued the plaintiff for his bill of six pounds. The plaintiff defended the suit, and claimed sixty pounds costs paid to the messenger in his suit, and also his own costs; but the claim was denied, Lord Tenterden saying: "I think the defendant is not liable for the costs beyond the writ; a man has no right, merely because he has an indemnity, to defend an action, and to put the person guaranteeing to useless expense." [144] But, on the other hand, where debt was brought by the plaintiff, as sheriff, against the defendants, on a bond given to the plaintiff as surety to the jail liberties for a debtor in execution, it appeared that the sheriff had given notice to the defendants, and that they assisted in the defence of the suit; it was held in New York that the costs of the suit against the plaintiff were properly recoverable against the defendants.[145] ** Where a surety allowed a suit to go by default without notice, he was only allowed to recover the costs incident on the service of the summons, as he should have notified his principal and allowed him to settle without further costs.[146]

* The French law peremptorily requires notice, if the surety desires to charge the debtor with his expenses. Its language is clear: "The surety who has paid has recourse against the principal debtor, whether he entered into the contract of suretyship with or without the knowledge of the debtor. And he shall recover the principal, interest, and expenses; but the surety shall recover only such expenses as are incurred after the princi-

[143] Spurrier *v.* Elderton, 5 Esp. 1.

[144] Gillett *v.* Rippon, 1 Moo. & Mal. 406. It is suggested in this case, by Gurney, of counsel for plaintiff, that "notice was given to the defendant, and he might have paid or stopped the action;" but nothing is said of any notice in the statement of the case, which was at Nisi Prius. See Freeman's Bank *v.* Rollins, 13 Me. 202.

[145] Kip *v.* Brigham, 7 Johns. 168.

[146] Steinhart *v.* Doellner, 34 N. Y. Super. Ct. 218.

pal debtor is notified of the suit against the surety; and the surety shall also recover damages in a proper case." [147] **

* The same principles which we have been considering are applied to claims made against sureties; so it has been said, that if one becomes surety for a debtor, the creditor cannot recover from the surety the costs of a fruitless suit against the debtor unless he give notice of his intention to sue.[148] ** In New Hampshire, in a suit by a sheriff on a bond given by sureties of his deputy, conditioned to indemnify him against all loss, damages, and costs, on account of the acts and neglects of the deputy, he is entitled to receive, as damages, in addition to the sums paid by him or his sureties on his official bond to the county to satisfy judgments recovered against him for the default of the deputy, and interest thereon, all such reasonable expenses as were incurred by him in and about the defence of the suits in which the judgments were rendered, including counsel fees and a reasonable compensation for his personal services; and in the suit on the bond the same expenses and compensation for services, beyond the taxable costs, but not the costs or expenses incurred in a suit upon his official bond, brought to enforce payment of such judgment; and upon a judgment in favor of the sheriff for the penalty of the bond, execution will be awarded as well for the damages that may have accrued subsequently to the commencement of the suit upon the bond, as for those prior thereto.[149] So in New York, in an action by a sheriff against the sureties of his deputy to recover damages for the neglect of the deputy to levy on execution, in consequence of which the execution creditor has recovered a judgment against the sheriff, the reasonable expenses of the sheriff in defending the suit against himself are recoverable as a part of his damages.[150]

§ 806. Consequential loss.

On a covenant to indemnify against all damages, costs, and expenses, by reason of a demand, the surety is not liable for a

[147] Code Civil, Art. 2028.

[148] Baker *v.* Garratt, 3 Bing. 56, *per* Best, C. J. This was an action against the sheriff for taking insufficient sureties on a replevin bond.

[149] Hoitt *v.* Holcombe, 32 N. H. 185.

[150] Westervelt *v.* Smith, 2 Duer, 449; *acc.*, Robertson *v.* Morgan, 3 B. Mon. 307.

premium or bonus which the party is compelled to pay to raise the amount necessary to meet the demand,[151] or for a loss through selling his property at a sacrifice to pay the debt.[152] In an action on an indemnity bond, if the plaintiff states no special damage in his complaint, he is confined in his recovery to such only as arise from the breach, and then such only as are proximate and the fair, legal, and natural result of the act complained of.[153] In a bond of indemnity from loss by reason of suits for infringement of a patent on goods sold by the defendant to the plaintiff, to be retailed by the latter, the plaintiff can recover the deterioration of his goods by attachment in the patent suit, but not for loss of credit by the attachment, or for the expense of a bond for dissolution of the attachment.[154] Where the defendant guaranteed a debt which was secured by a second mortgage on property of the debtor, he was not liable for the cost of foreclosing the mortgage when it appeared that the prior mortgage had already been foreclosed.[155] Where a surety on a stay bond, whose property has been sold in satisfaction of the judgment, moves for judgment against his principal, the measure of his damages is the amount of the judgment paid by the sale of his property, not the value of the property.[156] But in Indiana it was held that where the defendant had engaged "to pay and satisfy the mortgage, together with all interest and costs thereon accrued, accruing, and to accrue, and in every respect" save the plaintiff harmless, the value of the land sold in consequence of the breach of this engagement was held the measure of the plaintiff's damages.[157] In a similar case, the plaintiff was allowed to recover his attorney's fees, expenses, and costs on account of the sale and in proceedings to redeem.[158] Upon a bond to indemnify the plaintiff, a trustee, for loss in paying the defendant's debts, the plaintiff can recover the difference between the market price of bonds sold to pay the debts and the price actually obtained, plus the broker's commissions; but no damages can

[151] Low *v.* Archer, 12 N. Y. 277.

[152] Vance *v.* Lancaster, 3 Hayw. 130.

[153] Hallock *v.* Belcher, 42 Barb. 199.

[154] Ripley *v.* Mosely, 57 Me. 76.

[155] Peck *v.* Cohen, 40 N. Y. Super. Ct. 142.

[156] Coleman *v.* Riggs, 61 Ia. 543.

[157] Atherton *v.* Williams, 19 Ind. 105.

[158] Kansas City Hotel Co. *v.* Sauer 65 Mo. 279.

be obtained for a subsequent rise in the value of the bonds.[159] Upon a bond given to pay all damages of whatsoever nature and kind, that might be suffered by the construction of a pipe line, where the construction of the line made it necessary for plaintiff to remove his business, it was held that the bond by its terms covered consequential damages for loss of business suffered by reason of the necessity of removal.[160] And where sureties on a bail bond were obliged to pursue and rearrest the principal, they were allowed to recover the expense of so doing.[161]

§ 807. Co-sureties.

* We have now to consider the relative rights and liabilities of co-sureties. The right of action of the surety against the co-surety or his representatives arises when the surety pays more than his share of the obligation, and not before.[162] The obligation arises out of the relation between the parties, and does not exist where the suretyship is not joint. Thus where the plaintiff signed a bond as surety for another, and defendant signed as surety for plaintiff, the defendant cannot be called upon to contribute, but the plaintiff must exonerate him.[163] Since the recovery rests upon the relationship of the parties, and suit is not brought upon the debt itself the fact that the defendant was not liable upon the debt would not relieve him from the obligation to contribute, if the plaintiff was obliged to pay. So if the statute of limitations had run in favor of the defendant, but the plaintiff was compelled to pay, he may call on the defendant to contribute.[164] If however the surety was not compelled to pay he cannot recover.[165]

[159] Beckley *v.* Munson, 22 Conn. 299.

[160] Pennsylvania Nat. Gas Co. *v.* Cook, 123 Pa. 170, 16 Atl. 762.

[161] Milk *v.* Waite, 18 Abb. New Cas. 236.

[162] *Massachusetts:* Wood *v.* Leland, 1 Met. 387.

Tennessee: Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.

Wisconsin: Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

[163] Cutter *v.* Emery, 37 N. H. 567.

[164] *Alabama:* Preslar *v.* Stallworth, 37 Ala. 402.

Maine: Crosby *v.* Wyatt, 23 Me. 156.

Massachusetts: Wood *v.* Leland, 1 Met. 388.

New Hampshire: Boardman *v.* Paige, 11 N. H. 431.

Ohio: Camp *v.* Bostwick, 20 Oh. St. 337, 5 Am. Rep. 669.

Tennessee: Reeves *v.* Pulliam, 7 Baxt. 119.

Texas: Faires *v.* Cockerell, 88 Tex. 428, 437, 31 S. W. 190, 28 L. R. A. 528.

Vermont: Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

[165] In Russell *v.* Failor, 1 Oh. St.

§ 807a. Amount of contribution.

The surety is entitled to recover against the co-surety, or, if more than one, against any of them, his aliquot portion of the sum paid, if they are sureties in equal degree. It is possible for sureties to agree in advance as to the share of the debt for which each is to be responsible; and in that case no surety is entitled to contribution except for such amount as he has paid beyond his agreed proportion.[166] If several sureties are bound in different amounts, the contribution is to be determined in proportion to the amount for which each is bound.[167]

The surety's claim for contribution must be based on what he actually paid. So if he discharged the debt for less than its face value, he can recover no more than the proper proportion of what he paid; [168] and if he discharged the debt in a debased currency or by a conveyance of land, his recovery must be based on the actual value of what he gave.[169] So if he paid the

327, 59 Am. Dec. 631, a surety paid a note which was void for usury. It was held that he could not get contribution from his co-surety. But in Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4, it was held that the surety was not obliged to take advantage of the technical law imposing a penalty for usury, but having paid the debt might recover.

In Harley *v.* Stapleton, 24 Mo. 248, a surety on a note given for a bet, invalid when given, was compelled by a Mexican judgment to pay. It was held that the surety could not recover contribution, since he was the party to an illegal transaction.

[166] Gourdin *v.* Trenholm, 25 S. C. 362, 377.

In an action for refusal to contribute to loss suffered in carrying stock, an agreement to *pro rata* the loss or gain was held to mean that the defendants were to share equally with the plaintiff the loss and gain, and not to mean that the defendants were to share among themselves the loss or gain and to indemnify the plaintiff for all loss suffered by him. Penniman *v.* Stanley, 122 Mass. 310.

[167] Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75.

[168] *Indiana:* Hall *v.* Hall, 42 Ind. 585.

Missouri: Hearne *v.* Keath, 63 Mo. 84.

Wisconsin: Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964.

[169] Edmonds *v.* Shehan, 47 Tex. 443.

Where the value of the property was agreed on by the surety and the creditor, it would seem that this should be taken as the actual value in the absence of evidence of bad faith. In Jones *v.* Bradford, 25 Ind. 305, 308, an action by sureties against the co-surety for contribution, where the debt was paid by a transfer of land the Supreme Court of Indiana said:

"The price at which the lands were received in payment would, we think, ordinarily constitute the proper rule in such cases. If they were taken on a compromise of a doubtful claim, or from parties of doubtful solvency, at a price greatly above their value, perhaps the amount on which contribution by a co-surety would be estimated would be the actual value of the lands.

debt without suit, he cannot recover, in addition to the proper proportion of the debt, any portion of an attorney's fee allowed in the obligation in case of suit.[170]

§ 807b. Insolvency or discharge of a surety.

If one of the sureties is insolvent, or for any other reason cannot be made to pay his proportion of the debt, he is left out of the calculation, and the amount recovered is based upon the number of solvent sureties.[171] The considerations bearing on the distribution of the burden between the sureties are well illustrated by the case of Currier *v.* Baker.[172] There were several sureties on a claim. Part payments had been made by A, one of the sureties, but he had left the state. Other sureties had died insolvent or left the state. Three were left, plaintiff, defendant and X. Plaintiff had paid $1,800, X had paid $1,200, and defendant had paid nothing. Plaintiff had obtained $450 from one of the sureties out of the state and given him a full discharge from his claim. It was held that this would count as if the surety out of the state had paid plaintiff his entire share. A, not having claimed contribution, would be left entirely out of the present settlement. The three thousand dollars paid by plaintiff and X would be shared between plaintiff, defendant, X and the out of state contributory, counting him as having paid his share of it; *i, e.*, the defendant would pay a quarter of the whole amount to the plaintiff and X as their interest might appear. The insolvent estates of the deceased were not to be taken into account since it was as much the duty of one remaining surety as another to proceed against

The lands were the plaintiffs', and without regard to their cost they were clearly entitled to the increase in their value, or the legitimate profits made by their purchase, not, however, exceeding the amount paid by them on the debt for which the defendant was liable."

[170] Acers *v.* Curtis, 68 Tex. 432, 4 S. W. 551.

[171] Insolvency of a surety:

Nebraska: Smith *v.* Mason, 44 Neb. 610, 63 N. W. 41.

South Carolina: Sloan *v.* Gibbes, 56 S. C. 480, 486, 35 S. E. 408, 76 Am. St. Rep. 559.

Tennessee: Gross *v.* Davis, 87 Tenn. 226, 11 S. W 92, 10 Am. St. Rep. 635.

Wisconsin: Faurot *v.* Gates, 86 Wis. 569, 57 N. W. 294.

Contra, England: Cowell *v.* Edwards, 2 B. & P. 268.

Absence of a surety: Faurot *v.* Gates, 86 Wis. 569, 57 N. W. 294.

[172] 51 N. H. 613.

them, and no one having proceeded, they would be left out of the account.

§ 807c. Interest and attorney's fees.

Since the recovery for contribution is not based upon the original claim, the surety cannot call upon his co-sureties to pay interest at the rate provided in the contract,[173] nor is he entitled to recover attorney's fees allowed in the contract.[174] He is however entitled to interest at the legal rate upon the amount he actually paid out.[175]

§ 808. Costs and legal expenses.

* The question has been examined as to the right of the co-surety to be reimbursed for a proportion of any costs paid by him. In a case at Nisi Prius between co-sureties for a tax collector it appeared the plaintiff had been sued on the principal's default, and judgment had been recovered, and the plaintiff claimed, besides half the verdict against him, half the costs of both parties in the original suit. But Lord Chief-Justice Tenterden held, at Nisi Prius, that the defendant was only liable for half the verdict.[176] No question was made either as to notice or the necessity of the suit, nor, would it seem, could any such question properly arise between co-sureties.

But in a more recent case, in the Exchequer, where the plaintiff and defendant had executed, as co-sureties, a warrant of attorney given as a collateral security for a sum of money advanced on mortgage to the principal, and on default being made by the principal, judgment was entered upon the warrant of attorney, and execution issued against the plaintiff, it was held that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution, Parke, B., saying: "They were costs incurred in a proceeding to recover

[173] *California:* Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

Texas: Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380.

Wisconsin: Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

[174] Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380.

[175] *California:* Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

Texas: Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380.

[176] Knight *v.* Hughes, 3 C. & P. 467; s. c. M. & M. 247.

a debt for which, on default of the principals, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion." [177] ** And it is now well settled that the costs and expenses of a reasonable defence of the suit may be included in the settlement,[178] though not the costs of a frivolous defence.[179]

§ 808a. Reduction of surety's claim.

Any fact which goes to show that the plaintiff surety is not equitably entitled to contribution will to that extent defeat his claim. So where he has received a security or indemnity, the amount of it must be deducted and contribution sought for the balance only; security given to one surety inures to the benefit of all.[180] So it may be shown, in order to defeat the claim for contribution, that the surety suing for contribution was indebted to the principal in a larger amount than he was compelled as surety to pay for the principal, and thus

[177] Kemp *v.* Finden, 12 M. & W. 421. A distinction may, perhaps, be taken between costs incurred in a suit and upon entering up judgment on a warrant of attorney; otherwise these decisions are inconsistent, and if so, the former would seem the more correct in principle; for, as between the indorser and maker of a note, there is no contract to save harmless, and each surety should stand ready to pay the debt.

[178] *Alabama:* Carter *v.* Fidelity & Deposit Co., 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 41.

Illinois: Wagenseller *v.* Prettyman, 7 Ill. App. 192.

Kentucky: Bosley *v.* Taylor, 5 Dana, 157, 30 Am. Dec. 677.

Maine: Davis *v.* Emerson, 17 Me. 64.

Massachusetts: Newcomb *v.* Gibson, 127 Mass. 396.

Michigan: Backus *v.* Cayne, 45 Mich. 584.

North Carolina: Bright *v.* Lennon, 83 N. C. 183.

Oregon: Van Winkle *v.* Johnson, 11 Ore. 469, 50 Am. Rep. 495.

Rhode Island: Conolly *v.* Dolan, 22 R. I. 60, 46 Atl. 36, 84 Am. St. Rep. 810.

Tennessee: Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.

Vermont: Marsh *v.* Harrington, 18 Vt. 150; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Briggs *v.* Boyd, 37 Vt. 534.

[179] Jones *v.* Jones, 16 Ala. 545.

So where one of the sureties desired to settle the claim rather than defend the suit, and did in fact pay his share, he could not be held to contribute toward the expenses of litigation. Van Winkle *v.* Johnson, 11 Ore. 469, 50 Am. Rep. 495.

[180] *District of Columbia:* Gibson *v.* Shehan, 5 D. C. App. Cas. 391, 28 L. R. A. 400.

Iowa: Hoover *v.* Mowrer, 84 Ia. 43, 50 N. W. 62, 35 Am. St. Rep. 293.

North Carolina: Carr *v.* Smith, 129 N. C. 232, 39 S. E. 831.

This is however not the case where the indemnity is received from a third party. So where the principal's wife

defeat the claim for contribution.[181] And the same principle applies where the judgment against the principal was the result of the wrongful act of the surety.[182] So where the surety of a corporation was also a director and got hold of money of the corporation which could have been applied to the payment of the debt and misapplied it, and was then forced to pay one of the debts of the corporation, it was held that he could not call on his co-surety for contribution.[183]

indemnified one surety from property not liable for the debt, it was held that the other sureties had no right to share the indemnity. Leggett *v.* McClelland, 39 Oh. St. 624.

[181] Bezzell *v.* White, 13 Ala. 422.

[182] *Missouri:* Block *v.* Estes, 92 Mo. 318, 4 S. W. 731 (as deputy of the principal acted illegally).

Pennsylvania: Eshleman *v.* Bolenius, 144 Pa. 269, 22 Atl. 758 (negligently advised bad investment).

[183] Simmons *v.* Camp, 71 Ga. 54.

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